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No. 93-1187

IN THE
Supreme Court of the United States
OCTOBER TERM, 19

TORWICO ELECTRONICS, INC.,
Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an order by a government environmental agency, requiring a corporate chapter 11 debtor to spend assets of its estate to clean up property not owned or occupied by the debtor, constitutes a dischargeable "claim" within the meaning of section 101(5) of the Bankruptcy Code, as interpreted by the Court in *Ohio v. Kovacs*, 469 U.S. 274 (1985).

PARTIES TO THE PROCEEDING

The petitioner is Torwico Electronics, Inc., a debtor under Chapter 11 of the United States Bankruptcy Code.[1] The respondent is the New Jersey Department of Environmental Protection and Energy. Although not a party to this case, George Allen Associates has a direct interest in its outcome.

[1] Torwico Electronics, Inc. has no parent corporation or subsidiaries.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Torwico Electronics, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, *infra* pp. 1a-13a, is reported at 8 F.3d 146 (3d Cir. 1993). The opinion of the District Court, *infra* pp. 16a-21a, is reported at 153 B.R. 24 (D.N.J. 1992). The opinion of the Bankruptcy Court, *infra*

pp. 22a-60a, is reported at 131 B.R. 561 (Bankr. D.N.J. 1991).

JURISDICTION

The judgment of the Court of Appeals in this case was entered by an opinion and judgment filed October 25, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED[2]

11 U.S.C. § 101(5)

"claim" means --

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

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[2] This provision previously was codified at 11 U.S.C. § 101(4).

STATEMENT OF THE CASE

Petitioner Torwico Electronics, Inc. ("Torwico") is a debtor under title 11, chapter 11 of the United States Code ("Bankruptcy Code"). Beginning in 1961, Torwico operated a manufacturing facility on leased premises on New Hampshire Avenue in Lakewood, New Jersey.

In September 1985, Torwico's lease expired and the company moved its operations to a property located on Oberlin Avenue, also in Lakewood, New Jersey. The company has not had any property interest in the New Hampshire Avenue property since vacating the premises in 1985. JA 16.[3] Torwico conducted business at the Oberlin Avenue property from September 1985 until its assets were liquidated in accordance with a December 1992 order of the bankruptcy court.

Torwico's cessation of manufacturing operations at New Hampshire Avenue triggered Torwico's obligation under the New Jersey Environmental Cleanup Responsibility Act ("ECRA")[4] to notify the state and clean up any hazardous substance contamination on the property. Torwico complied with ECRA's notice requirements by informing the New

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[3] Citations to "JA" refer to the Joint Appendix filed by the parties before the Third Circuit below.

[4] ECRA, enacted by the New Jersey legislature in 1983 and substantially amended in 1993, requires the owner or transferror of certain industrial property to notify the state of a pending property transfer or cessation of industrial operations and, if necessary, to conduct a state-supervised cleanup as a precondition to transfer of the property. *See* N.J. Stat. Ann. §§ 13:1k-6 *et seq.* (1991) (amended by 1993 N.J. Laws 139). Under ECRA, the tenant and landlord are jointly and severally liable for cleanup obligations. *See Russell-Stanley Corp. v. Plant Indus., Inc.*, 595 A.2d 534, 545 (N.J. Super. Ct. Ch. Div. 1991) (under ECRA, State may order landlord to clean up property contaminated by a former tenant).

Jersey Department of Environmental Protection (since renamed the Department of Environmental Protection and Energy, "NJDEPE") that hazardous wastes were removed from the site regularly by Torwico's solvent supplier. JA 221. On April 22, 1985, however, an NJDEPE inspector visited the New Hampshire Avenue property and observed stained soils. The NJDEPE required Torwico to conduct sampling and the results indicated the presence of contamination in soils. JA 222. The NJDEPE required Torwico to sample groundwater beneath the New Hampshire Avenue property and Torwico retained an environmental consultant to conduct a groundwater investigation. JA 224.

In April 1988, Torwico entered into an agreement with its former landlord, George Allen Associates ("George Allen"), to share the cost of further environmental assessment and remediation in accordance with their obligations to the State under ECRA. JA 37. To expedite the cleanup, George Allen took charge of the actual cleanup work, assumed responsibility for obtaining all necessary approvals from the NJDEPE, and paid the cleanup costs. Torwico agreed to reimburse George Allen for fifty percent of the cleanup costs. JA 203. The cleanup proceeded under NJDEPE supervision. In March 1989, workers discovered additional contamination emanating from a septic system containing hazardous substances. JA 203.

For unrelated business reasons, Torwico filed a petition for reorganization under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Jersey on August 4, 1989. Torwico listed the Attorney General of New Jersey, the NJDEPE and George Allen as unsecured creditors holding disputed claims regarding Torwico's liability for the cleanup of environmental contamination at the New Hampshire Avenue property. JA 24. On October 4, 1989, the bankruptcy court issued an order

scheduling the first meeting of creditors, notifying creditors of the automatic stay and establishing January 2, 1990 as the bar date for creditors to file proofs of claim. On the same day, the bankruptcy court served copies of that order, by mail, on the Attorney General of New Jersey and the NJDEPE. JA 254. The State, however, never filed a proof of claim with the bankruptcy court.

On November 13, 1989, eight months after discovery of the septic system and almost two months before the bar date for claims, an NJDEPE investigator issued two notices of violation to the company regarding the New Hampshire Avenue septic system. JA 203-204.[5] The first alleged that Torwico had violated provisions of the New Jersey Spill Compensation and Control Act ("Spill Act"), N.J. Stat. Ann. §§ 53:10-23.11c, 53:10-23.11e, by discharging hazardous substances and by failing to report those discharges to the State.[6] The second alleged that Torwico had disposed of hazardous wastes into the septic system without first obtaining a permit to operate a hazardous waste facility, in violation of regulations promulgated pursuant to the New Jersey

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[5] The NJDEPE also issued a third notice of violation, alleging that Torwico had failed to obtain a new hazardous waste generator identification number from the U.S. Environmental Protection Agency when it moved from New Hampshire Avenue to Oberlin Avenue in 1985. Torwico subsequently obtained the proper identification number for its Oberlin Avenue plant and has never asserted that the Bankruptcy Code in any way affected its obligation to comply with regulatory requirements applicable to its continuing operations at the Oberlin Avenue property.

[6] The Spill Act prohibits the discharge of hazardous substances. In the event of a discharge, the Spill Act gives the NJDEPE authority to: (1) order the discharger to clean up or (2) conduct the cleanup itself, using money from a designated fund, and then recover those costs from the discharger. *See* N.J. Stat. Ann. § 58:10-23.11f(a), (f).

Solid Waste Management Act ("SWMA"). *See* N.J. Admin. Code tit. 7, § 26-12.1(a). Subsequently, the NJDEPE issued an administrative order to Torwico requiring Torwico to clean up the septic system and assessing a civil penalty of $22,500.00 for violation of the SWMA.[7] In August 1990, the NJDEPE issued another notice of violation to Torwico and George Allen, alleging that both had failed to comply with provisions of ECRA. JA 366-67.

Torwico filed an adversary proceeding in the bankruptcy court[8] seeking a declaration that its alleged liability to the State constituted an unsecured "claim" within the meaning of section 101(5) of the Bankruptcy Code because Torwico could comply only by paying an environmental contractor to perform the necessary cleanup.[9] The State's answer to the complaint asserted that Torwico's obligations to clean up its former property under ECRA, the SWMA, and the Spill Act constituted "ongoing regulatory obligations" which could not be discharged as "claims" in bankruptcy.

On cross-motions for summary judgment, the bankruptcy court held for Torwico that the NJDEPE's cleanup order was

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[7] The NJDEPE order is reproduced at pp. 61a-67a, *infra*.

[8] Federal subject matter jurisdiction over the proceeding existed pursuant to 28 U.S.C. § 1334(a). Jurisdiction of the bankruptcy court existed pursuant to 28 U.S.C. § 157(b).

[9] *See* 11 U.S.C. § 101(5). At the time Torwico filed the complaint in this proceeding the definition of "claim" was codified at section 101(4) of the Bankruptcy Code, 11 U.S.C. § 101(4). The recodification did not change the language of the section. For purposes of clarity and consistency, the section is identified throughout this Petition as 101(5), even when reference is made to cases decided prior to the recodification.

an unsecured "claim."[10] The bankruptcy court held that, under this Court's decision in *Ohio v. Kovacs*, 469 U.S. 274 (1985), "where a debtor in bankruptcy cannot clean up environmental contamination himself or itself without paying money, the obligation to clean up pursuant to an injunction is a debt which is dischargeable in bankruptcy." 131 B.R. at 570 (*infra* p. 39a). Because Torwico could comply with the NJDEPE's administrative order only by spending money, the bankruptcy court concluded that Torwico's liability to the State was a "claim" under section 101(5) of the Bankruptcy Code. The bankruptcy court also held that the State had forfeited its right to participate in any distribution of funds under Torwico's plan of reorganization by failing to file a proof of claim before the bar date. 131 B.R. at 573 (*infra* pp. 47a-49a). The bankruptcy court further held that provisions of ECRA which purport to dictate the treatment of cleanup obligations in bankruptcy are void under the Supremacy Clause, U.S. Const. Art. VI, § 2.[11]

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[10] *Infra* pp. 31a-47a. The bankruptcy court subsequently signed an order entering judgment for Torwico on September 20, 1991.

[11] 131 B.R. at 573-78 (*infra* pp. 49a-56a). The ECRA provision in question provided:

> No obligations imposed by this act shall constitute a lien or claim which may be limited or discharged in a bankruptcy proceeding. All obligations imposed by this act shall constitute continuing regulatory obligations imposed by the state.

N.J. Stat. Ann. § 13:1k-12 (1991). The constitutionality of this provision was not considered by either the district court or the Third Circuit below. Paragraph 15 of the NJDEPE's administrative order contained similar language. *See infra* p. 66a.

The State appealed the bankruptcy court's judgment to the district court, which reversed.[12] The district court distinguished *Kovacs* on the grounds that in *Kovacs* the State of Ohio had admitted in oral argument that the only performance sought from the debtor was the payment of money. Concluding that the NJDEPE in this case had no alternative payment remedy, the district court held that Torwico's cleanup obligation was not a dischargeable claim under the Bankruptcy Code. 153 B.R. at 26 (*infra* pp. 19a-20a).

Torwico appealed the district court's decision to the United States Court of Appeals for the Third Circuit, which affirmed.[13] The Third Circuit concluded that New Jersey was not seeking money from Torwico and had no right to payment under the statutory authority asserted in the administrative orders. Torwico's cleanup obligations were ongoing, the court concluded, because they "run with the waste" and apply regardless of where the waste may be located. The court thus ruled that New Jersey's right to enforce its order was not a "claim" under the Bankruptcy Code and therefore was a non-dischargeable obligation of the debtor.

SUMMARY OF ARGUMENT

The Third Circuit's decision conflicts with the decision of this Court in *Ohio v. Kovacs*, 469 U.S. 274 (1985). In *Kovacs*, this Court ruled that the Bankruptcy Code defines the term "claim" broadly to include the obligation of a debtor to spend money to comply with a government injunc-

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[12] The district court had jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a).

[13] The Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

tion requiring an environmental cleanup. This Court acknowledged in *Kovacs* that a debtor who continues to own or possess property must operate its property in compliance with environmental laws. However, the Court ruled that where a debtor's legal rights to own or occupy the property have been cut off—in that case by the appointment of a receiver—the obligation to spend money to pay for a cleanup is a "claim" subject to discharge in bankruptcy.

In this case, Torwico never owned the contaminated property and its right of occupancy ended with the expiration of its lease, almost four years prior to the commencement of the bankruptcy case. Thus, like the debtor in *Kovacs*, Torwico has no continuing right of ownership or possession over the property subject to the cleanup order. Under the reasoning in *Kovacs*, the State's right to compel Torwico to pay for a cleanup is a "claim" under the Bankruptcy Code.

The Third Circuit's decision not only conflicts with *Kovacs*, but also with the decisions of other Circuit Courts of Appeals. *See United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988); *In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992). In *Whizco*, the Sixth Circuit applied Kovacs in ruling that a government order compelling the debtor, a former coal mine operator, to spend money to reclaim a mine was a dischargeable claim under the Bankruptcy Code. Similarly, the Seventh Circuit, in *CMC Heartland*, applied the logic of *Kovacs* to distinguish between the case where a debtor's environmental liabilities are based on its actions as a former site operator, and are thus dischargeable claims, and the case where the environmental liabilities are based on the debtor's current status as a property owner or operator, and thus may not be dischargeable. In contrast, the Third Circuit below held that the debtor's cleanup obligation survives bankruptcy regardless of whether the debtor continues to own or occupy the property involved.

The decision below is unsupported by the language of section 101(5) and subverts the fundamental policies underlying the Bankruptcy Code: (1) providing equal treatment to all similarly-situated creditors, and (2) affording debtors a fresh start when they emerge from bankruptcy. Ruling that cleanup obligations are not "claims," as the Third Circuit did, requires that the State's interest takes precedence over the claims of other legitimate creditors. As the drafters of the Bankruptcy Code recognized, such disguised priorities prejudice other creditors and undermine a debtor's opportunity for a fresh start. In particular, corporate debtors facing liabilities of unknown magnitude which pass through the bankruptcy to the reorganized entity may be denied the financing and new investment necessary to reorganize. Cut off from lenders and investors and unable to resolve their liabilities in the bankruptcy, otherwise salvageable enterprises are more likely to liquidate, resulting in the loss of jobs and economic resources.

A writ of certiorari should be issued in this case to ensure that this Court's ruling in *Kovacs* is properly followed, to avoid inconsistencies among the Circuit Courts of Appeals, and to give effect to the important policy choices which Congress incorporated into the Bankruptcy Code.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S INTERPRETATION OF THE DEFINITION OF "CLAIM" IN *OHIO V. KOVACS*

A. This Court Repeatedly Has Held that the Definition of "Claim" Should Be Broadly Construed

The Bankruptcy Code provides for the discharge of debts, subject to specified exceptions. *See* 11 U.S.C. §§ 727

(chapter 7 discharge), 1141(d)(1)(A) (chapter 11 discharge), 523 (exceptions to discharge). Discharge of debts is the primary benefit which debtors receive under the Bankruptcy Code. The discharge gives effect to Congress' policy decision that debtors are entitled to a fresh start, free of all prior debts, on the theory that a financially-rehabilitated corporation is of greater social value than a liquidated one. The Bankruptcy Code is therefore designed to ensure that all of a debtor's liabilities can be addressed in the bankruptcy case.

The term "debt" is defined as "liability on a claim." 11 U.S.C. § 101(12). A "claim," in turn, is broadly defined as any "right to payment, whether or not such right is...contingent,...disputed,...equitable,...or unsecured" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment."[14]

Starting with *Ohio v. Kovacs*, 469 U.S. 274 (1985), this Court has concluded that the terms "claim" and "right to payment" should be construed broadly to permit the most comprehensive discharge of the debtor's obligations. 469 U.S. at 279 ("Congress desired a broad definition of 'claim.'"); *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 558 (1990) (holding that a State's right to enforce a criminal restitution order constituted a "claim," and reasoning that both the term "claim" itself and the phrase "right to payment" were to be read expansively reflecting "Congress' broad rather than restrictive view of the class of obligations that qualify as a 'claim' giving rise to a 'debt'"); *Johnson v. Home State Bank*, ___ U.S. ___, 111

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[14] 11 U.S.C. § 101(5). The full text of section 101(5) is reproduced at p. 2, *supra*. This provision was formerly codified at § 101(4).

S. Ct. 2150, 2154 (1991) ("Congress intended . . . to adopt the broadest available definition of 'claim.'").

In *Davenport*, the Court noted the language in the House Report accompanying the 1978 amendments to the Bankruptcy Code which described the term "claim" as having the "broadest possible" definition, and which noted that the Code "contemplates that *all legal obligations* of the debtor . . . will be able to be dealt with in the bankruptcy case." 495 U.S. at 558 (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266) (emphasis added); *accord* S. Rep. No. 989, 95th Cong., 2d Sess. 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5808.

The Third Circuit below erred by failing to give effect to the broad definition of "claim" in the Bankruptcy Code, as interpreted by this Court in *Kovacs, Davenport* and *Johnson*.

B. The Decision Below is in Direct Conflict with the Holding of *Kovacs*.

The Third Circuit's decision is inconsistent with the holding of this Court in *Kovacs*. In *Kovacs*, the Court ruled that the term "claim" included injunctions which require a debtor to spend money for environmental cleanup of property that he no longer operated or possessed.

Kovacs was the chief executive officer and stockholder of a company which owned and operated the Chem-Dyne hazardous waste disposal site in violation of state laws. Ohio obtained an injunction requiring Kovacs to remove existing waste from the site and forbidding Kovacs from bringing additional waste on the property, but Kovacs did not comply. In response, the State obtained the appointment of a receiver who took possession of all of Kovacs' assets, including the

Chem-Dyne site. Kovacs then filed a petition under chapter 7 of the Bankruptcy Code and sought to discharge his obligation to perform a cleanup under the terms of the injunction. The State filed a complaint seeking a declaration that Kovacs' obligation to remove waste from the property was not a "claim" and thus not dischargeable. 469 U.S. at 276-77.

This Court ruled that Kovacs' obligation to comply with the injunction to remove wastes was a "claim" under section 101(5)(B) of the Bankruptcy Code. The Court reasoned that, because Kovacs had no authority over the site and the only way he could comply was to pay to defray the costs of cleanup, the equitable remedy of an injunction had been converted to a right to payment and was thus a "claim" dischargeable in Kovacs' bankruptcy. 469 U.S. at 282-83.

The Court tempered its decision by cautioning that anyone in possession of the site may be subject to cleanup obligations under state law, including Kovacs himself, if he came into possession after the receivership was liquidated. 469 U.S. at 285. Nonetheless, the Court concluded that, where the debtor does not own or possess the affected property, an injunction to perform an environmental cleanup which can only be satisfied by the payment of money is a "claim" that is dischargeable under the Bankruptcy Code.[15]

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[15] The Court's opinion in *Kovacs* was unanimous, but Justice O'Connor wrote separately to explain that the ruling would not leave the state without any recourse against the debtor's assets. As Justice O'Connor noted, *how* the state's interest in the debtor's property is classified in bankruptcy (*i.e.* as a lien, a perfected security interest or a mere unsecured claim) is generally left to state law. *See Kovacs*, 469 U.S. at 285-86 (O'Connor, J., concurring). What the State may not do, as the bankruptcy court in this case decided below, is dictate *whether or not* the State's interest is a "claim" in the first place. *See* 131 B.R. at 576-77

(continued...)

Like the debtor in *Kovacs*, Torwico can comply with the cleanup orders from the State only by paying a contractor to clean up the site.[16] As a corporation, Torwico cannot perform any cleanup action except by paying contractors or employees to do the work. Moreover, even prior to the sale of all its physical assets, Torwico did not have the expertise necessary to conduct an environmental cleanup. Since its liquidation, Torwico has had no employees and no assets except for cash. The only way Torwico could comply, both at the time New Jersey issued its cleanup orders and now, is to pay money to someone qualified to perform the clean-up.[17]

The Third Circuit attempted to justify its decision not to follow *Kovacs*, contending that it was enjoining "continued pollution" because the hazardous substances already in the soil at the New Hampshire Avenue property could continue to migrate. 8 F.3d at 151 (*infra* pp. 10a-11a). This distinction is untenable. In *Kovacs*, this Court faced exactly the

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[15] (...continued)
(*infra* p. 59a) That decision was made by Congress when it enacted section 101(5) under its constitutional authority to establish "uniform Laws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, cl. 4, and the Supremacy Clause bars any state law to the contrary.

[16] In support of its motion for summary judgment, Torwico filed an affidavit from its president, Robert Savino, stating that Torwico did not have the expertise in environmental sciences necessary to prepare a closure plan, and that if Torwico were compelled to prepare such a plan, it would have to retain an environmental consulting firm to do so. JA 117-19.

[17] New Jersey's own rules specify that an independent, registered professional engineer must certify that a cleanup has been completed according to state-approved standards. N.J. Admin. Code tit. 7, § 26-9.8(l).

same factual situation, noting that at the Ohio property "the ground . . . remains permeated with toxic materials that must be removed if further pollution of the public waters is to be avoided." 469 U.S. at 278. Nonetheless, this Court concluded that because the State was seeking to compel the debtor to pay for a cleanup, the State was enforcing a "right to payment" which constituted a "claim."

Moreover, like the debtor in *Kovacs*, Torwico does not own or possess the property in question. In *Kovacs*, the Court noted that the appointment of a receiver was significant because "it dispossessed Kovacs, [and] removed his authority over the site." 469 U.S. at 283. In this case, Torwico was already dispossessed of the property by virtue of the expiration of its lease almost four years before the bankruptcy filing. Thus, the ruling in *Kovacs* controls this case and the Court should grant certiorari to correct the Third Circuit's error.

The Court of Appeals below also attempted to distinguish *Kovacs* on the basis that New Jersey was not seeking the payment of money, but the performance of work. A close reading of *Kovacs*, however, shows that the State of Ohio also argued that it was seeking the performance of some action and not the payment of money. *See* 469 U.S. at 282-83. This Court looked behind the formalism of Ohio's position to determine the substance of the State's demand:

> The impact of [the State's] attempt to realize upon Kovacs' income or property cannot be concealed by legerdemain or linguistic gymnastics. Kovacs cannot personally clean up the waste . . . . He cannot perform the affirmative obligations properly imposed on him by the State

> court except by paying money or transferring his own financial resources.

469 U.S. at 282 (quoting the Sixth Circuit's decision below, *Ohio v. Kovacs*, 717 F.2d 984, 988 (6th Cir. 1983)). Similarly, Torwico can only comply with New Jersey's cleanup orders by paying an environmental professional to prepare and implement a cleanup plan for the site. New Jersey's purpose in enforcing its orders was made clear early in this litigation: "[T]he government's access to private funds for cleanup purposes must be assured whenever possible, including when private funds are available from an estate in bankruptcy." JA 180 (NJDEPE brief in the bankruptcy court). Thus, what the State is seeking here is not an action by the debtor, but the use of the debtor's funds to pay for the cleanup.

The State argued that its right to equitable relief cannot be reduced to a "right to payment" because it has proceeded under two statutes, the Environmental Cleanup Responsibility Act ("ECRA"), N.J. Stat. Ann. §§ 13:1K-6 *et seq.* (1991), and the Solid Waste Management Act, N.J. Stat. Ann. §§ 13:1E-1 *et seq.*, which the state contends only allow for enforcement through injunctions and do not create a right to sue to recoup cleanup costs. However, the State has the authority to perform the cleanup itself and sue Torwico (and the property owner) to recover the cleanup costs under another statute, the Spill Compensation and Control Act ("Spill Act"), N.J. Stat. Ann. §§ 58:10-23.11 *et seq.*, which the State invoked in its original notice of violation.[18] If the

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[18] *See* p. 5, *supra*. New Jersey courts have concluded that ECRA and the Spill Act apply *in pari materia*. *See Superior Air Products v. NL Indus., Inc.*, 522 A.2d 1025, 1035 (N.J. Super. Ct. App. Div. 1987), *appeal dismissed*, 598 A.2d 872 (N.J. 1991).

State chooses to proceed under ECRA, Torwico would pay the cleanup contractor directly, but if the State decides to take action under the Spill Act, the State would pay the cleanup contractor in the first instance and then attempt to recoup the money from Torwico.[19] Accordingly, New Jersey clearly has a "right to payment" in this case.

In determining whether the State of Ohio's right to enforce an injunction was a claim in *Kovacs*, this Court looked not at the statutory source of these rights, but at the impact of the enforcement of these rights on the debtor. If the only way to comply with the injunction is to pay money, then the cleanup order has been "converted into an obligation to pay money." 469 U.S. at 283.

Finally, this Court held that an enforceable obligation may be a "right to payment" even where the creditor may not sue directly to obtain the money. *Davenport*, 495 U.S. at 559-60. In *Davenport*, the State of Pennsylvania argued that a criminal restitution order did not constitute a right to payment, and therefore was not a "claim" under the Bankruptcy Code, because neither the State nor the victim could sue to enforce payment. This Court ruled that because the restitution obligation could be enforced through other means, such as the revocation of probation or incarceration, it thus was a right to payment for bankruptcy purposes. *Id.* The Court concluded that "[t]he plain meaning of 'a right to payment' is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation." *Id.* at 559.

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[19] In one of its early briefs, the State acknowledged that "[i]f the State had directed Torwico to clean up, and Torwico had not complied and the State performed the cleanup itself, the cost recovery action could be seen as the 'mere collection of a monetary judgment.'" JA 172.

Like *Davenport*, this case involves a state's powers to force a debtor to make a payment to a third party—in this case, a cleanup contractor. Here, the State may enforce its cleanup order by imposing penalties for non-compliance or seeking to have Torwico held in contempt. Thus, under the reasoning in *Davenport* and *Kovacs*, the State is enforcing a "right to payment," which is a "claim" under section 101(5) of the Bankruptcy Code.

II. THE THIRD CIRCUIT'S DECISION BELOW IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS

In holding that an environmental cleanup injunction is not a claim where the debtor did not own or possess the property to be cleaned up, the Third Circuit's decision is in direct conflict with decisions of the Sixth and Seventh Circuits, and is significantly inconsistent with decisions of the Second and Ninth Circuits. Unless this petition is granted, the obligation to comply with an environmental cleanup order may be a dischargeable claim if a debtor files its bankruptcy petition in Cleveland, but not if the debtor files in Pittsburgh. The Court should issue a writ of certiorari to resolve this inconsistency.

Although the facts of this case are clearly analogous to the facts before the Sixth Circuit in *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988), the two courts reached diametrically opposite conclusions. In *Whizco*, the federal government had issued an order under the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 201 *et seq.*, to the debtor, an individual who formerly operated an abandoned mine, requiring restoration of that mine. The federal government argued that the obligation to comply with the order was not a claim because the govern-

ment was seeking compliance with an injunction, not a payment, and that SMCRA did not give the government the legal right to payment. Relying on *Kovacs*, the Sixth Circuit concluded that the obligation to comply was a "claim" because compliance would require the debtor to pay money:

> It is clear . . . that the defendant does not have the physical capacity to reclaim the mine site himself, and that he would have to hire others to perform the work for him. This would require the expenditure of money. . . . To the extent, therefore, that the injunction would have purpose or value it would require the payment of money. Thus, when we look at the substance of what the plaintiff seeks, rather than the form of relief sought, we see that the plaintiff is really seeking a payment.

Whizco, 841 F.2d at 150. The Sixth Circuit held that the obligation to comply with the injunction was discharged, except to the extent that the debtor could do so without spending money. *Id.* at 151. Here, Torwico, as a corporate debtor, may only comply by spending money.

Although the Third Circuit below stated that its decision follows the Seventh Circuit's decision in *In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992), a careful reading of that case reveals that the Third Circuit's holding actually conflicts with the Seventh Circuit's view. In *CMC Heartland*, a railroad, which had owned and operated a hazardous waste site named Wheeler Pit, filed for bankruptcy under the Bankruptcy Act of 1898. A reorganized successor emerged from bankruptcy still owning the site. When the U.S. Environmental Protection Agency issued an administrative order under sections 106 and 107 of the Comprehensive

Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9606, 9607, the reorganized entity, CMC, sought a declaration that the obligation to comply with the injunction was a discharged claim.

The Seventh Circuit ruled that CMC's liability under CERCLA as the operator of Wheeler Pit prior to the date of reorganization constituted a claim which had been discharged, reasoning that "[t]o the extent that §§ 106 and 107 require a person to pay money today because of acts before or during the reorganization proceedings, CERCLA creates a 'claim' in bankruptcy." 966 F.2d at 1146. The Seventh Circuit explained that this result was consistent with the purposes of the bankruptcy law:

> Reading "claim" broadly ensures that those injured by the debtor's hazardous wastes share in the available assets, just as those run down by its trains are entitled to distributions as creditors. Because the United States neglected to file a claim under CERCLA in the reorganization, CMC's liability as the operator or manager of Wheeler Pit before the bar date in 1985 is extinguished.

Id.

However, the Seventh Circuit held that the government could still enforce its injunction against CMC because CMC continued to own Wheeler Pit after emerging from bankruptcy and was the current owner of the site. The court reasoned that because section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), imposes liability on the current owner of a hazardous waste site—even if that current owner did not participate in the disposal of hazardous waste—CMC could still be compelled to implement a cleanup. *CMC Heartland*,

966 F.2d at 1147. The Seventh Circuit described this responsibility as "a statutory obligation attached to *current ownership* of the land [which] survives bankruptcy." *Id.* (emphasis added). Thus, CMC could be compelled to comply with a cleanup order because it owns Wheeler Pit today, not because it was responsible for disposing of waste in the past.

In this case, Torwico is not the current owner or operator of the property which the State has ordered cleaned up. Nonetheless, the Third Circuit concluded that just as liability in *CMC Heartland* "ran with the land," liability in Torwico's case, "ran with the waste," because Torwico allegedly was liable under New Jersey law as the person who generated the waste and arranged for its disposal.[20] This analysis ignored the Seventh Circuit's careful effort to distinguish between liability based on a debtor's pre-bankruptcy acts, which constitute dischargeable claims, and liability based on the ownership of land which may attach to any current landowner, including a debtor who has emerged from bankruptcy. Under the reasoning of *CMC Heartland*, Torwico's obligations as an operator of the site and a generator of waste should be dischargeable claims; Torwico has no liability as a current owner.[21]

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[20] 8 F.3d at 151 (*infra* pp. 11a-12a). Significantly, the law to which the Third Circuit referred is the Spill Act, which the state did not invoke as authority for its administrative order but which does provide the State with the right to recover cleanup costs. *See* N.J. Stat. Ann. § 58:10-23.11f.

[21] Indeed, in another case arising out of the same bankruptcy, *In re Chicago, Milwaukee, St. Paul & Pacific RR Co.*, 974 F.2d 775 (7th Cir. 1992), the Seventh Circuit ruled that the State of Washington's CERCLA claim against CMC was discharged with respect to a property which

(continued...)

The Third Circuit also misapplied the Second Circuit's decision in *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991). The *Chateaugay* case involved the question whether the LTV Corporation could discharge its obligations to comply with injunctive orders which EPA may issue or secure from a court under section 106 of CERCLA, 42 U.S.C. § 9606, with respect to sites which the debtor would continue to own or operate after emerging from bankruptcy. In *Chateaugay*, the Second Circuit ruled that an injunction "to ameliorate ongoing pollution" was not a "claim" and would not be dischargeable. 944 F.2d at 1008. But it is clear that the Second Circuit's ruling was limited to situations in which the debtor continues to own the affected property:

> It is difficult to understand how any injunction directing a *property owner* to remedy ongoing pollution could be a dischargeable "claim," if, as *Kovacs* instructs, the *owner* "may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions."[22]

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[21] (...continued)
CMC had sold prior to emerging from bankruptcy. Other circuits have likewise held that CERCLA claims relating to property not part of the bankruptcy estate are dischargeable. *See In re Chateaugay Corp.*, 994 F.2d 997, 1005 (2d Cir. 1991) (contingent claims for reimbursement of CERCLA cleanup costs dischargeable); *In re Jensen*, 995 F.2d 925, 930-31 (9th Cir. 1993) (liability for cost of removing hazardous substances from debtor's former property held to be a dischargeable "claim").

[22] The *Chateaugay* court also concluded that its ruling was consistent with *Midlantic Nat'l Bank v. New Jersey Dept. of Environmental* (continued...)

Chateaugay, 944 F.2d at 1009 (emphasis added) (quoting *Kovacs*, 469 U.S. at 285). Thus, the result in *Chateaugay*, if not the reasoning, is consistent with *CMC Heartland*: debtors who emerge from bankruptcy may be subject to environmental cleanup injunctions at properties which they continue to own. But neither case establishes that a debtor, such as Torwico, may be compelled to use estate assets to clean up property which it never owned and which it vacated almost four years before filing for bankruptcy protection.

Finally, the Third Circuit's decision is inconsistent with the Ninth Circuit's decision in *In re Dant & Russell, Inc.*, 853 F.2d 700 (9th Cir. 1988). Although *Dant & Russell* did not involve an attempt by a government agency to enforce an environmental cleanup injunction, the Ninth Circuit clearly ruled that the obligation imposed by a landlord on a former tenant to clean up leased property should be treated like any other claim in the tenant's bankruptcy. In *Dant & Russell*, a landlord sued its debtor-tenant, demanding the full cost of cleaning up property contaminated by the debtor during the course of an expired lease. The Ninth Circuit relied on *Kovacs* for the conclusion that where a creditor was seeking to require the debtor to perform or pay for the cleanup of property that was not part of the debtor's estate, such an obligation was a general unsecured claim under the Bankrupt-

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[22] (...continued)
Protection, 474 U.S. 494, 507 (1986), in which this Court ruled that a bankruptcy trustee "may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health and safety from identified hazards." If a debtor who does not continue to own or possess property may be compelled to use the assets of the estate to clean up that property, then this Court would have no reason to decide, as it did in *Midlantic*, whether environmental laws limit the bankruptcy power to abandon the property.

cy Code. *Dant & Russell,* 853 F.2d at 708-09. The Ninth Circuit reasoned that to treat such obligations differently would be to create a new bankruptcy priority not provided for by Congress:

> Although [the landlord] asserts that public policy considerations entitle its claims for cleanup costs to administrative expense priority, we acknowledge that Congress alone fixes priorities. . . . Courts are not free to formulate their own rules of super or sub-priorities within a specifically enumerated class.

Id. at 709 (citation omitted).

The Third Circuit's decision has created just such a new priority by requiring a former tenant to exhaust the assets of its estate to complete the cleanup of property which it never owned and does not operate before it may pay its other creditors. This is squarely in conflict with the decision of the Ninth Circuit in *Dant & Russell*, where the Court of Appeals recognized that such a result violates the priority scheme established by Congress in the Bankruptcy Code.

III. THE THIRD CIRCUIT'S DECISION UNDERMINES THE BANKRUPTCY CODE'S POLICIES OF PROVIDING THE DEBTOR WITH A FRESH START AND ASSURING EQUAL TREATMENT OF CREDITORS.

The drafters of the Bankruptcy Code enacted by Congress in 1978 were guided by twin beacons: "the two strong bankruptcy policies of a fresh start for the debtor and the equality of treatment of all creditors." H.R. Rep. No. 595, 95th Cong., 1st Sess. 285 (1977), *reprinted in* 1978 U.S.C.-

C.A.N. 5963, 6242. The Third Circuit's decision in this case not only ignores these two fundamental bankruptcy policies, but undermines each of them.

First, by classifying environmental orders arising from prepetition events as anything other than general unsecured claims, the Third Circuit's decision will result in unequal treatment of similarly situated creditors by elevating the interests of state and federal environmental agencies over the rights of all other unsecured creditors. The funds a debtor is forced to expend to comply with an environmental agency's order—for example, to remediate a landfill to which the debtor shipped waste years prior to the bankruptcy—will be unavailable to pay the claims of lenders, suppliers, contractors, workers, retirees, tort victims, and other legitimate claimants. This result was never intended by Congress. To the contrary, Congress has expressly stated its intent to eliminate such disguised priorities and put all creditors with prepetition claims within the same class on an equal footing:

> [Non-bankruptcy] laws that grant priorities do so at the expense of other creditors and to the detriment of the orderly liquidation and distribution of a bankrupt estate. Thus, the bill, in the interest of a coherent bankruptcy policy, eliminates special priorities found in other laws and brings all priorities into the bankruptcy code itself.
>
> [E]xceptions to discharge not found in the bankruptcy code itself are subject to the same criticism that special priorities are: they are not enacted with balancing of the

> myriad competing interests in the bankruptcy arena, and frequently are contrary to the two strong bankruptcy policies of a fresh start for the debtor and the equality of treatment of all creditors.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 285 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6242. Accordingly, reversal of the Third Circuit's decision is necessary to maintain the policy of equality among creditors.

Second, by allowing environmental cleanup orders relating to pre-bankruptcy conduct at property outside the debtor's estate to escape bankruptcy treatment, the Third Circuit's decision will thwart debtors' efforts to obtain a fresh start and will impede their attempts to reorganize their affairs. In many cases, debtors will be burdened by non-dischargeable liabilities for environmental cleanups, the costs of which may be impossible to ascertain and which may take years to complete. Moreover, the difficulty of projecting the size or timing of such expenditures may make it impossible for a debtor to formulate an effective business plan—the *sine qua non* of a plan of reorganization.

In particular, the decision will frustrate the efforts of corporate debtors to reorganize by denying them access to the financing necessary both to operate during the chapter 11 case, and to emerge from bankruptcy. *See* Martin J. Bienenstock, *Bankruptcy Reorganization* 93 (1987). Lenders and investors will put their money into a reorganizing business if old obligations can be discharged and if the company shows a potential for future profits. But they will not put new money into a company that is subject to continuing cleanup obligations at property the debtor does not own or use in its business, such as a landfill to which the debtor sent waste years ago. *See* CERCLA § 107(a)(3), 42 U.S.C.

§ 9607(a)(3) (imposing strict, joint and several liability on persons who "arranged for disposal...of hazardous substances").

Third, because the Third Circuit's decision has the effect of impeding debtors' efforts to reorganize, otherwise salvageable companies will be compelled to liquidate, costing workers their jobs and leaving other creditors unsatisfied. A corporate liquidation generally reduces the assets available to pay all creditors because the liquidation value of a company is generally less than its going concern value. Liquidations forced by prepetition events are thus antithetical to Chapter 11 of the Bankruptcy Code, which rests on the premise that a rehabilitated company is more socially useful than a liquidated one. As this Court recognized in *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983):

> By permitting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners. . . . Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if "sold for scrap."

See also NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) (reorganization prevents a debtor from having to liquidate "with an attendant loss of jobs and possible misuse of economic resources.")

Finally, as a general matter, the goal of environmental protection will not be prejudiced if this Court decides to overturn the Third Circuit's decision below. Reversal will require the government in most cases to file a claim and receive pro rata payment from the debtor as provided for under a plan of reorganization. In addition, in most cases

where the debtor does not own the affected property, the federal or state government may pursue other responsible parties, not in bankruptcy, to implement the cleanup. In this case, for example, Torwico's landlord is jointly and severally liable with Torwico; to the extent that Torwico cannot be compelled to complete the cleanup, the State may pursue the landlord. Further, at most hazardous waste sites, a substantial number of other responsible parties may be compelled to perform or pay for the cleanup. In fact, it is not unusual to identify more than a hundred responsible parties at a single "Superfund" site. *See, e.g., Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 883 (3d Cir. 1985) (142 companies alleged to be responsible for cleanup costs at a landfill), *cert. denied*, 476 U.S. 1115 (1986). To the extent the government's claims remain unsatisfied, the government may resort to public funds to complete the cleanup. That is a significant reason why the United States Treasury collects substantial, broad-based taxes designated for the CERCLA Hazardous Substance Superfund. *See* CERCLA § 111, 42 U.S.C. § 9611. New Jersey has a similar tax-based fund. *See* N.J. Stat. Ann. § 58:10-23.11f(7).

What the Third Circuit has done below is precisely what this Court refused to do in *Kovacs*: establish a new bankruptcy priority for environmental cleanup obligations which would take precedence over all other prepetition unsecured obligations. This decision not only jeopardizes a debtor's ability to obtain a fresh start, but permits the federal and state governments to consume all of a debtor's unencumbered assets to clean up property that is not part of the debtor's estate, while legitimate private claimants go unpaid. This decision should be reversed.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 24, 1994

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5021

IN RE TORWICO ELECTRONICS, INC.,
Debtor,

TORWICO ELECTRONICS, INC.,
Appellant

v.

STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Appellee

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 92-01828)

Argued August 3, 1993
Before:
STAPLETON, HUTCHINSON AND ROTH, *Circuit Judges*
(Opinion Filed October 25, 1993)

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

This case involves an attempt by the State of New Jersey to force Torwico Electronics, a debtor in chapter 11 bankruptcy, to comply with its obligations under state and federal environmental laws. Torwico asserts that these obligations are "claims," within the meaning of 11 U.S.C. § 101(5), and that, because the state failed to timely file a proof of claim, it is no longer responsible for them. The state claims that what is involved here are regulatory obligations, not bankruptcy claims. The bankruptcy court decided the issue in Torwico's favor, but was reversed by the district court. We conclude that the district court adopted the correct approach to this issue and will affirm.

I.

Torwico Electronics conducted a manufacturing business from a location in Ocean County, New Jersey until September 1985 when it moved to a new location. The Ocean County site ("the property") was owned by George Allen Associates and was leased to Torwico during the time Torwico did business at that address.

On August 4, 1989, Torwico filed for chapter 11 bankruptcy and listed the New Jersey Department of Environmental Protection and Energy (NJDEPE) on its schedules as a creditor with a disputed and unliquidated claim. On October 4, 1989, the bankruptcy court sent notice to all creditors, including NJDEPE, of Torwico's Chapter 11 bankruptcy and informed them that the last day to file a proof of claim was January 2, 1990. The following month, on November 13, 1989, NJDEPE performed an on-site inspection of the property and found a hidden illegal seepage pit containing hazardous wastes--wastes which were allegedly migrating into local waters. NJDEPE also found that

Torwico was operating at its new site without the identification number required by EPA. NJDEPE immediately issued three notices of violation to Torwico, one concerning the failure to obtain a new identification number at the new place of business, and the others concerning the hazardous wastes found at the property. Torwico claims no knowledge of the seepage pit and the wastes found there.

The January 2, 1990 deadline for filing a proof of claim passed without any filing by NJDEPE. While Torwico did obtain an ID number for its new place of business, it did nothing about the seepage pit at the property. On April 9, 1990, NJDEPE issued an Administrative Order and Notice of Civil Administrative Penalty Assessment to Torwico relating to the violation noted in November 1989. The Order required Torwico to submit a written closure plan for the seepage pit and assessed a $22,500 penalty for failure to take action following the November notice. The Order also stated: "No obligations imposed [by this order] . . . are intended to constitute a debt, damage claim, penalty or other civil action which should be limited or discharged in a bankruptcy proceeding. All obligations are imposed pursuant to the police powers of the State of New Jersey, intended to protect the public health, safety, welfare, and environment."

Torwico and NJDEPE filed cross-motions for summary judgment before the bankruptcy court, with Torwico seeking to avoid its obligations to the state by claiming that they were claims barred by the absence of a filing prior to the bar date. The court agreed with Torwico and released the company from its obligations because NJDEPE had failed to timely

file a proof of claim. On appeal, the district court reversed. Torwico then filed this appeal.[1]

II.

A.

Because debts are dischargeable in Chapter 11, critical to the resolution of this case is whether Torwico's obligations constitute a "debt" under the bankruptcy code. A "debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1988). A "claim," in turn, is defined in part as a:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

---

[1] A final order reversing the decision of the bankruptcy court was issued by the district court on December 14, 1992. We therefore have jurisdiction under 28 U.S.C. § 1291. The district court properly exercised jurisdiction over this case pursuant to 28 U.S.C. § 158(a), and the bankruptcy court had jurisdiction over this chapter 11 bankruptcy pursuant to 28 U.S.C. § 157.

Because the issues raised here are questions of law, and because the district court's decision was made in a summary judgment context, our review is plenary.

11 U.S.C. § 101(5) (1988). Torwico contends that this broad definition clearly encompasses its obligations to the state under the administrative order and the state statute pursuant to which it was issued. NJDEPE, on the other hand, contends that it has no "right to payment"; rather, it has only the right to enforce laws requiring Torwico to clean up the hazardous wastes it is responsible for under state law.

Both sides agree that a proper interpretation of the Supreme Court decision in *Ohio v. Kovacs*, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985) is instrumental in resolving this case. In *Kovacs*, the state of Ohio obtained an injunction against *Kovacs* requiring him, *inter alia*, to clean up hazardous wastes on his property. When *Kovacs* failed to comply, the state obtained a court order appointing a receiver for the property. The receiver was directed to take possession of the property, as well as other assets, and complete the cleanup. After the receiver was appointed, but before he completed the cleanup, *Kovacs* filed for personal bankruptcy. The state, seeking to obtain some of *Kovacs'* post-bankruptcy income for use in paying for the cleanup, argued that *Kovacs*'s obligation to clean up the property under the state's environmental laws was not a "debt" (or, in other words, that the state had no "claim") and was not dischargeable. The Supreme Court disagreed.

After looking at the definition of "claim" and the legislative history, the Court concluded that the state had a "right to payment" and thus possessed a "claim." It noted that *Kovacs* no longer had possession of the site nor control over the cleanup; all the state sought from *Kovacs* was money to fund the cleanup. In essence, the Court found that *Kovacs*'s obligation had been reduced to a monetary claim. In reaching its decision, the Court noted a number of issues it was not deciding:

> We do not address what the legal consequences would have been had *Kovacs* taken bankruptcy before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee. . . . We do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State's waters is dischargeable in bankruptcy; we here address . . . only the affirmative duty to clean up the site and the duty to pay money to that end. . . . We do not question that anyone in possession of the site . . . must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State or refuse to remove the source of such conditions.

Id. at 284-85.

Torwico contends that *Kovacs* applies here: *Torwico's* "affirmative duty to clean up the site and the duty to pay money to that end" is a claim. In addition, Torwico is no longer in possession of the site and thus, the Court's admonition that parties in possession "must comply with the environmental laws of the State" and cannot "refuse to remove" hazardous wastes does not apply to it. NJDEPE contends that *Kovacs* is inapplicable here because it does not seek a monetary judgment, but rather seeks to remedy ongoing pollution by forcing Torwico to clean up the site.

B.

Considerable insight into the issue presented here may be gleaned from two recent appellate cases that have dealt with similar questions. In *In re CMC Heartland Partners*,

966 F.2d 1143 (7th Cir. 1992), the debtor owned a hazardous waste site and went through bankruptcy under the Bankruptcy Act of 1898. Subsequently, EPA issued an order pursuant to CERCLA § 106, 42 U.S.C. § 9606, to the debtor, who still owned the site, requiring removal and remediation activity. The Seventh Circuit Court of Appeals held that the order, which was based on ownership of the land, survived reorganization. The court noted that "[t]o the extent [the relevant federal statutory sections] require a person to pay money today because of acts before or during the reorganization proceedings, CERCLA creates a 'claim' in bankruptcy." *Id.* at 1146. However, by authorizing cleanup orders to current owners, CERCLA § 106 creates a claim "running with the land," and a "statutory obligation attached to current ownership of the land survives bankruptcy." *Id.* at 1147. Thus, the court found in favor of EPA, but warned that EPA must show under § 106 that the releases were "threatened or ongoing"; otherwise, one might conclude that EPA merely "repackaged a forfeited claim for damages." *Id.*

In *In re Chateaugay*, 944 F.2d 997 (2d Cir. 1991), the court faced the issue of what constituted a claim in the context of the bankruptcy of LTV, an entity that owned and operated literally dozens of hazardous waste sites. The Second Circuit held that the EPA's costs of responding to a release of hazardous waste, even if not yet incurred at the time of bankruptcy, involved claims; thus, EPA was forced to file a proof of claim with respect to these costs and stand in line with the other creditors. As to injunctions requiring the debtor to clean up a waste site, the court made the following distinction:

> EPA is entitled to seek payment if it elects to incur cleanup costs itself, but it has no authority to accept

> a payment from a responsible party as an alternative to continued pollution. Thus, a cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating ongoing pollution emanating from such wastes is not a dischargeable claim. It is true that, if in lieu of such an order, EPA had undertaken the removal itself and sued for the response costs, its action would have both removed the accumulated waste and prevented continued pollution. But it is only the first attribute of the order that can be said to remedy a breach that gives rise to a right to payment. Since there is no option to accept payment in lieu of continued pollution, any order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a 'claim.' But an order to clean up a site, to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, is a 'claim' if the creditor obtaining the order had the option, which CERCLA confers, to do the cleanup work itself and sue for response costs, thereby converting the injunction into a monetary obligation.

Id. at 1008.[2]

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[2] The parties here also devote considerable attention to our decision in *Penn Terra Ltd. v. Dept. of Environmental Resources*, 733 F.2d 267 (3d Cir. 1984). In this pre-*Kovacs* case, the court examined whether attempts by the state to enforce a pre-bankruptcy injunction requiring Penn Terra to undertake certain cleanup actions was barred by the automatic stay provisions of § 362. The court concluded that because the injunction was

(continued...)

C.

We find *CMC* and *Chateaugay* to be both persuasive and consistent.[3] Applying the precepts outlined in those cases to the situation here present leads us to conclude that Torwico's obligations under the administrative order do not constitute a claim.

As *Kovacs* noted, a debtor cannot maintain an ongoing nuisance in direct violation of state environmental laws. The state can exercise its regulatory powers and force compliance with its laws, even if the debtor must expend money to comply. Under *Kovacs*, what the state cannot do is force the debtor to pay money to the state; at that point, the state is no longer acting in its role as regulator, it is acting as a creditor.[4]

Here it is clear that the state demanded not that Torwico pay money over to the state, but rather that it take action to

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[2] (...continued)
an exercise of state regulatory power and was not an action for a "money judgment," the state could enforce the injunction. Because this case involved the automatic stay provision of the Bankruptcy Code and the court expressly declined to discuss whether the injunction constituted a "claim" or "debt," *see id.* at 277 n.11, this case is of only marginal relevance in deciding the issue currently before us.

[3] We note that neither NJDEPE nor Torwico appears to challenge the correctness of *CMC* or *Chateaugay* but rather, they dispute the proper application of those decisions to the current situation.

[4] Were we to adopt the bankruptcy court's position that any order requiring the debtor to expend money creates a dischargeable claim, it is unlikely that the state could effectively enforce its laws: virtually all enforcement actions impose some cost on the violator.

ameliorate ongoing hazard.[5] This is not the end of the inquiry, however. As noted in *Kovacs*, even if an injunction does not facially require payment of money, it still may present a "claim." 469 U.S. at 274. *Chateaugay* and *CMC* also both suggest that, at least in some circumstances, an injunction that requires a cleanup may still be considered a "claim." *CMC* held that the CERCLA § 106 order there involved must be in response to an ongoing and continuing threat, and not merely the repackaging of a forfeited claim for damages. 966 F.2d at 1146-47. *Chateaugay* states that where an order imposes "obligations distinct from any obligation to stop or ameliorate ongoing pollution," the order presents a claim if the government could have done the work itself and then sought reimbursement; under such circumstances there is a "breach of an obligation that gives rise to a right of payment." 944 F.2d at 1008.

The state here found that the seepage pit was a continuing problem that was leaking hazardous material into the surrounding environment. Thus, the state is not asserting a "repackaged claim for damages"; rather, there is an ongoing and continuing threat and, in the words of *Chateaugay*, an obligation on the part of the debtor "to ameliorat[e] ongoing pollution emanating from [accumulated] wastes." *Chateaugay*, 944 F.2d at 1008. The state has no "right to payment" here. What it has is a right to force the debtor to comply with applicable environmental laws by remedying an existing hazard.

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[5] The Order requires Torwico to submit "a written closure plan . . . for closure of the seepage pit." App. at 210. An affidavit from an employee of NJDEPE discusses in detail the findings of contamination and the fact that wastes are migrating into the surrounding environment. *See* App. at 219-31 ("It is safe to assume, at the concentrations detected at the property boundary, that the contamination has migrated offsite.").

The single fact which Torwico relies on most heavily is that it is no longer in possession of the site, and has not been in possession for several years. Thus, Torwico argues that it is not maintaining a nuisance or participating in an ongoing release of hazardous substances into the environment. It notes that a prime factor in *Kovacs* was that the debtor was no longer in possession of the property and that a receiver was in possession and was conducting the cleanup. Similarly, unlike the debtor in *Chateaugay*, Torwico is not, in its view, "continuing to pollute" here. Finally, Torwico notes that *CMC* found a "statutory obligation running with the land"; Torwico no longer owns or occupies the land here.

We do not find Torwico's suggested distinction persuasive. Unlike the debtor in *Kovacs*, Torwico can (and in the state's view, must) conduct the cleanup: it has access to the site and the state has not, apparently, performed any cleanup on its own. Under New Jersey law, Torwico is a generator of hazardous waste and as such has an ongoing responsibility for the wastes it disposes. Even though Torwico no longer possesses the property, it is still, allegedly, Torwico's wastes that are presenting a continuing environmental hazard. Under New Jersey law, Torwico is accordingly still responsible for the nuisance and cannot avoid compliance with the environmental laws. *Kovacs*, *CMC*, and *Chateaugay* all suggest that Torwico must remedy the situation; the obligations under the Order are not a "claim."[6]

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[6] The parties dispute whether if the state has an "alternate payment remedy" the order becomes a "claim." Here, it is undisputed that the order was issued under statutory sections which do not allow the state to perform the cleanup and then sue for reimbursement of its costs. That authority may exist under other potentially relevant statutes for the state to perform the cleanup and seek reimbursement for its costs is irrelevant--

(continued...)

D.

Unlike *Kovacs*, the state in this case neither seeks money nor has a right to payment under the statutory authority asserted or the Order imposed; the state seeks compliance with its laws through a cleanup of a current hazardous situation. In the words of *Chateaugay*, "there is no option to accept payment in lieu of continued pollution," and there is an order intended to "ameliorate continued pollution"; thus, the Order "is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a 'claim.'" 944 F.2d at 1008. Under the circumstances here present, Torwico's obligations do not run with the land as did the debtor's in *CMC*; however, they run with the waste. To the extent that Torwico's waste poses a continuing hazard, Torwico is responsible for remedying the problem regardless of where the waste might be.[7] As in *CMC*, the release here is "threatened and ongoing"; as in *CMC*, this is

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[6] (...continued)
-much as it was irrelevant in *CMC* and *Chateaugay*. The *Chateaugay* court noted that "to the extent that [an order] imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, [it] is a 'claim' if the creditor obtaining the order had the option . . . to do the cleanup work itself and sue for response costs." *Chateaugay*, 944 F.2d at 1008. Here, Torwico's obligation was an obligation to ameliorate ongoing pollution; it had no option to pay for the right to allow its wastes to continue to seep into the environment. That the state may have had alternative means at its disposal to end the ongoing threat does not convert its statutory authority into a "right to payment."

[7] *CMC* held that a "statutory obligation attached to current ownership of the land survives bankruptcy." 966 F.2d at 1147. Similarly, a statutory obligation attached to hazardous waste (i.e. to make sure it does no damage) also survives bankruptcy.

not a "repackaging [of] a forfeited claim for damages" (966 F.2d at 1147) for past conduct, but rather an attempt to prevent additional future damage.

IV.

In conclusion, we hold that the state's attempt in this case to force a party to clean up a waste site which poses an ongoing hazard is not a "claim" as defined by the Bankruptcy Code. This is not a situation where the state is attempting to get money from the debtor but rather, it is an exercise of the state's inherent regulatory and police powers. We will therefore affirm the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5021

IN RE TORWICO ELECTRONICS, INC.,
Debtor,

TORWICO ELECTRONICS, INC.,
Appellant

v.

STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Appellee

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 92-01828)

STAPLETON, HUTCHINSON AND ROTH, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on August 3, 1993.

On consideration whereof, if is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 14, 1992, be, and the same is

hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

[s] P. Douglas Sisk
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 92-1828 (AET)

TORWICO ELECTRONICS, INC.,
Plaintiff/Appellee
v.
STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION AND ENERGY,
Defendant/Appellant

On Appeal From the United States Bankruptcy
Court For the District of New Jersey

Decided December 8, 1992
Before: Anne E. Thompson, *District Judge*

MEMORANDUM AND ORDER

ANNE E. THOMPSON, *District Judge*.

This matter is before the Court on an appeal by the State of New Jersey, Department of Environmental Protection and Energy ("DEPE") from the Bankruptcy Court's judgment, filed September 20, 1991, in favor of Torwico Electronics, Inc. ("Torwico"), a manufacturer of electronic transformers. DEPE is appealing a final judgment of the Bankruptcy Court, and this Court has jurisdiction pursuant to 28 U.S.C.A.

§ 158(a) (West 1992). The Bankruptcy Court's legal conclusions are subject to plenary review, and its factual findings are examined under a clearly erroneous standard. *See* Fed. R. B.R. P. 8013; *J.P. Fyfe, Inc. v. Bradco Supply Corp.*, 891 F.2d 66, 69 (3d Cir. 1989) (citations omitted).

Background

The parties' dispute arises from an illegal seepage pit located on property that Torwico had leased from George Allen Associates ("GAA"). Torwico relocated after the lease ended in September 1985; however, it subsequently entered into an agreement with GAA to share certain costs related to New Jersey's Environmental Cleanup Responsibility Act ("ECRA"). *See* N.J. Stat. Ann. §§ 13:1K-6 to -14 (West 1991). On August 4, 1989, Torwico filed its Chapter 11 bankruptcy petition. In October 1989, the Bankruptcy Court issued an order declaring that January 2, 1990 was the last day on which a party could file a proof of claim or interest. DEPE, however, asserts that it did not receive notice of Torwico's bankruptcy filing.

In November 1989, DEPE inspected Torwico's former site and discovered the seepage pit containing hazardous wastes. The contamination, moreover, had migrated from the pit into off-site ground waters. Torwico denies that it used or even knew of the seepage pit during its operations on the former site. In late March 1990, Torwico filed an adversary proceeding seeking to preclude DEPE from imposing any liability or enforcing any obligation for environmental cleanup. Torwico reasoned that such a liability or obligation would constitute a claim under Chapter 11 of the Bankruptcy Code, and that DEPE was barred from pursuing any claims because of its failure to file a timely proof of claim. In response, DEPE argued that its efforts to

ensure that Torwico complies with environmental laws constitute an exercise of the state's police power and would not be dischargeable in bankruptcy.

In early April 1990, DEPE issued an Administrative Order and Notice of Civil Administrative Penalty Assessment to Torwico which required *inter alia* that Torwico develop a closure plan for the seepage pit. In August 1990, DEPE issued a Notice of Violation of ECRA to Torwico and GAA. In November 1990, Torwico filed a motion with the Bankruptcy Court for summary judgment and injunctive relief, and DEPE cross-moved for summary judgment. Following oral argument on January 14, 1991, and supplemental briefing and reargument on April 1, 1991, the Bankruptcy Court issued its opinion and order. *See In re Torwico Elecs., Inc.*, 131 B.R. 561 (Bankr. D.N.J. 1991).

The Bankruptcy Court held that the Torwico's cleanup obligation was an unsecured claim. *Id.* at 572; *see also* 11 U.S.C.A. § 101(5) (West Supp. 1992). It reasoned that "where a debtor in bankruptcy cannot clean up environmental contamination . . . without paying money, the obligation to clean up pursuant to an injunction is a debt which is dischargeable in bankruptcy." 131 B.R. at 569. Following this conclusion, the Bankruptcy Court held that the DEPE's claim was time-barred and that the sections of ECRA which "purport to dictate the treatment of cleanup obligations in bankruptcy" are void under the Supremacy Clause. *Id.* at 573, 576; *see also* N.J. Stat. Ann. § 13:1K-12 (West 1991) ("No obligations imposed by this act shall constitute a lien or claim which may be limited or discharged in a bankruptcy proceeding.").

Discussion

In *Ohio v. Kovacs*, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985), the Supreme Court affirmed the Sixth Circuit's conclusion that the debtor's "cleanup duty had been reduced to a monetary obligation," and constituted a claim under the Bankruptcy Code. *Id.* at 282, 105 S. Ct. at 709. In *Kovacs*, however, the state's attorney conceded in oral argument that the only performance sought from the debtor was the payment of money. *See id.* at 283. Thus, *Kovacs* does not mandate that all prepetition cleanup obligations are equivalent to monetary obligations. In *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 106 S. Ct. 755 (1986), 88 L. Ed. 2d 859, the Supreme Court held that a bankruptcy trustee cannot abandon property in contravention of state environmental statutes and regulations. *Id.* at 507. Although *Midlantic* specifically addressed the issue of a bankruptcy trustee's abandonment power, it clarified that: "Congress did not intend for the Bankruptcy Code to pre-empt all state laws." *Id.* at 505, 106 S. Ct. at 761.

In *Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267 (3d Cir. 1984), the Third Circuit interpreted sections 362(b)(4) & (5) of the Bankruptcy Code,[1] and addressed the issue of whether the actions of the Pennsylvania Department of Environmental Resources ("DER") were an attempt to enforce a money judgment. *Id.*

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[1] Section 362(b)(4) provides that no bankruptcy stay applies to the "commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C.A. 362(b)(4) (West 1979). Section 362(b)(5) provides that the stay applies to money judgments even if in furtherance of the state's regulatory power. *See id.* § 362(b)(5).

at 272. The *Penn Terra* court concluded that "the suit brought by DER to compel Penn Terra to remedy environmental hazards was properly brought as an equitable action to prevent future harm, and did not constitute an action to enforce a money judgment." *See id.* at 278. Although the bankruptcy stay provisions contain a specific exception for the exercise of police or regulatory power, and the provisions defining bankruptcy claims do not, *Penn Terra* recognizes that requiring a debtor "to rectify harmful environmental hazards" entails the exercise of state regulatory powers. *Id.* at 274.

In *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), the Second Circuit recognized the difficulty in classifying a debtor's obligation to clean up a toxic waste site that continues to leach hazardous substances into nearby water supplies. *See id.* at 1007. This obligation contains two elements: (1) to stop the on-going pollution, and (2) to cleanup the toxic substances which may have been deposited before the debtor filed for bankruptcy. The *Chateaugay* court concluded that: "[A] cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating on-going pollution emanating from such wastes is not a dischargeable claim." *Id.* at 1008.

In this case, the DEPE has no alternative payment remedy under ECRA and is attempting to remedy both past and ongoing pollution. In light of the foregoing case law, the Court concludes that Torwico's cleanup obligation under ECRA is not a dischargeable unsecured claim. The Court, therefore, need not reach the issue of whether the DEPE's purported claim would be time-barred. Similarly, since this conclusion eliminates the alleged conflict between ECRA and the Bankruptcy Code, the Supremacy Clause issue does not arise. *See Perez v. Campbell*, 402 U.S. 637, 644, 91 S. Ct. 1704, 1708, 29 L. Ed. 2d 233 (1971).

For all these reasons, it is on this 8th day of December 1992;

ORDERED that the Department of Environmental Protection and Energy's appeal of the Bankruptcy Court's decision granting Torwico Electronics, Inc. an injunction prohibiting the State from enforcing certain environmental laws be and hereby is granted, and it is further;

ORDERED that the Bankruptcy Court's ruling that Torwico Electronics, Inc.'s cleanup obligation is an unsecured claim be and hereby is reversed, and that the remainder of the Bankruptcy Court's decision be and hereby is vacated.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE TORWICO ELECTRONICS, INC.,
Debtor,

TORWICO ELECTRONICS, INC.,
Plaintiff,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Defendant.

Bankruptcy No. 87-06071
Adv. No. 90-3116 TS

Sept. 6, 1991
As Amended Sept. 27, 1991

MEMORANDUM OPINION

STEPHEN A. STRIPP, *Bankruptcy Judge*

This is an opinion on a motion and cross-motion for summary judgment in this adversary proceeding. The Debtor applies for a declaratory judgment that any obligation which it may have to the State of New Jersey under environmental laws to clean up contamination at the Debtor's former place of business is an unsecured claim under title 11, United States Code (the Bankruptcy Code), and that the State is now

barred from collecting because of failure to file a proof of claim within the time required by the Bankruptcy Rules. The Debtor also applies for an injunction permanently restraining defendant State of New Jersey, Department of Environmental Protection ("the DEP") from seeking to enforce such claims in any judicial or administrative proceeding. The DEP applies for a declaratory judgment that the Debtor's obligations to the State are not claims, and in the alternative, that any such claims are not time-barred. This court has jurisdiction under 28 U.S.C. §§ 1334(a) and 151. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B) and (O). This shall constitute the court's findings of fact and conclusions of law.

I.
FINDINGS OF FACT

The material facts are undisputed. The Debtor is in the business of manufacturing electronic transformers. Its present place of business is 410 Oberlin Avenue, Lakewood, New Jersey. However, until September, 1985 the Debtor's place of business was located at the corner of New Jersey Route 70 and New Hampshire Avenue in Lakewood ("the property"). The Debtor never owned this property, but, in fact, leased the property from the present owner, George Allen Associates ("GAA"). The Debtor's lease terminated and it moved from the property as of September 3, 1985. The Debtor has not had possession of or control over the property since then.

At some point after the Debtor moved from the property, the Debtor and GAA entered into an agreement to share

certain ECRA related costs.[1] The Debtor and GAA took certain steps to clean up contamination on the property.[2] A dispute then arose over a waste solvent seepage pit which GAA discovered during its cleanup. This pit was an illegal facility.[3] Torwico denies that it ever used the seepage pit and that it was even aware of its existence.[4] Remediation of soil contamination was completed to the DEP's satisfaction. However, there is extensive ground water contamination which apparently originated from the seepage pit and which has migrated off the property. The DEP believes that the ground water contamination poses a potential threat to public health.

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[1] Certification of Robert Savino, President of the Debtor, dated November 20, 1990, ¶ 3.

[2] Affidavit of Michael J. McCann, DEP Case Manager, filed March 8, 1991.

[3] *Id.*, para. 29.

[4] Savino Certification, *supra*. Although it is not part of the record in this adversary proceeding, it is part of the record in the Debtor's bankruptcy case that in October, 1986 GAA filed suit against the Debtor in the Superior Court of New Jersey for damages arising from alleged breach of lease provisions requiring the Debtor to comply with ECRA. The Debtor filed an answer denying liability, a counterclaim, and a third-party complaint. The third-party defendant, in turn, filed fourth-party complaints. The DEP is not a party to that case. After the Debtor filed its bankruptcy petition it removed the state court case to this court. However, this court later remanded the case to the state court. This court has not been informed that there has been any adjudication yet in that case of the question of liability as between the Debtor and GAA for environmental cleanup costs. Since GAA is not a party to this adversary proceeding, the judgment to be entered herein is presumptively not binding upon it.

On August 4, 1989, the Debtor filed a petition for reorganization under chapter 11 of the Bankruptcy Code. It remains a debtor in possession. It scheduled the DEP and the Attorney General of New Jersey on Schedule A-3, which is for unsecured creditors, as holding disputed claims against the Debtor.[5] On October 4, 1989 the court issued an Order for Meeting of Creditors, Combined with Notice Thereof and of Automatic Stay, which is a standard order issued in every bankruptcy case. The order issued in the Debtor's case stated in pertinent part as follows:

> ANY CREDITOR OR EQUITY SECURITY HOLDER WHOSE CLAIM OR INTEREST IS NOT SCHEDULED OR SCHEDULED AS DISPUTED, CONTINGENT OR UNLIQUIDATED SHALL FILE A PROOF OF CLAIM OR INTEREST ON OR BEFORE JANUARY 2, 1990 OR UNLESS OTHERWISE MODIFIED BY THE COURT.

This order was mailed by the court to each scheduled creditor. It stated whether each creditor's claim was scheduled as disputed, and each creditor was thereby informed as to whether it was necessary to file a proof of claim. Such filing is necessary to preserve the creditor's right to receive payment in the case; if a proof of claim is timely filed, a hearing is eventually scheduled to adjudicate the debtor's objection to such claim. Copies of the order in question were served by mail upon the Attorney General of the State of New Jersey and upon the DEP on October 4, 1989. The orders were mailed to the correct addresses, and were not

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[5] Bankruptcy Rule 1007(b)(1) requires a debtor to file schedules of its assets and liabilities on certain official forms.

returned as undelivered. The Attorney General and the DEP, however, deny that they were served with the order, stating that neither of them has any record of it.

The summons and complaint commencing this adversary proceeding were served upon the DEP on or about April 2, 1990. On April 9, 1990 the DEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment to the Debtor ("the Administrative Order").[6] In substance, it determines that the Debtor disposed of hazardous wastes in the seepage pit in violation of the Solid Waste Management Act, N.J.S.A. 13:1E-1 *et seq.* and regulations thereunder. The Administrative Order directs the Debtor to submit a written plan to the DEP for closure of the seepage pit within fifteen days. It also assesses a civil administrative penalty of $22,500 against the Debtor, and states that payment is due when the Order becomes final. It also states that the Order is binding upon any bankruptcy trustee, and that

> No obligations imposed by this Administrative Order and Notice of Civil Administrative Penalty Assessment (with the exception of (the $22,500 penalty]) are intended to constitute a debt, damage, claim, penalty or other civil action, which should be limited or discharged in a bankruptcy proceeding. All obligations are imposed pursuant to the police powers of the State of New Jersey, intended to protect the public health, safety, welfare, and environment.

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[6] *See* Exhibit D to Savino Certification, *supra*.

II.
STANDARDS GOVERNING SUMMARY JUDGMENT

These motions are governed procedurally by Bankruptcy Rule 7056, which incorporates by reference Rule 56 of the Federal Rules of Civil Procedure, dealing with summary judgment. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c). *In Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986), 91 L. Ed. 2d 265, the Supreme Court stated that:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed.R-.Civ.P. 1.

A party opposing a motion for summary judgment must

> . . . do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.'

Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348 (1986), 89 L. Ed. 2d 538.

As the cross-motions for summary judgment reflect, the parties agree that there are no genuine issues of material facts, *i.e.* facts which are essential to the determination of this action. The material facts are as stated in Section I above, and the disputes are as to issues of law.

III.

BEFORE FUNDS ARE EXPENDED BY A BANKRUPTCY ESTATE FOR ANY REASON, A DETERMINATION MUST BE MADE THAT THE EXPENDITURE IS AUTHORIZED UNDER THE CLASSIFICATION AND DISTRIBUTION PROVISIONS OF THE BANKRUPTCY CODE.

To place the issues which follow in their proper context, it is first necessary to briefly consider certain fundamental aspects of bankruptcy law.

The filing of a bankruptcy petition creates an estate which consists of substantially all legal and equitable interests of the debtor in property as of the commencement of the case. Code § 541. The Bankruptcy Code includes a system of provisions for classification of claims against the debtor's property, determination of priorities, and conditions to payment. Although there is a great variety of obligations under nonbankruptcy law requiring payment of money, the Bankruptcy Code provides that all such obligations must be classified within a small handful of categories. This system of classification is an integral part of bankruptcy law, because in the vast majority of bankruptcy cases, there are insufficient assets to satisfy all claims against the debtor in full. Because this creates competition for a debtor's assets, the Bankruptcy Code also includes a system of priorities.

There are only five basic categories of claims in the Bankruptcy Code against a debtor's assets. In order of priority, those categories are as follows:

1. *Secured claims*. These are claims secured by liens on a debtor's assets. A lien is essentially a right to resort to a particular asset for payment before any other creditor can resort to it. Under Bankruptcy Code § 506, a claim is secured to the extent of the value of the collateral, and

unsecured to the extent of any deficiency. Security interests, which essentially consist of contractual liens on real or personal property, are the most common form of lien. A security interest is property which is protected by the Takings Clause of the Fifth Amendment to the United States Constitution, which provides that no private property shall be taken for public use without just compensation. *United States v. Security Industrial Bank*, 459 U.S. 70, 103 S. Ct. 407 (1982), 74 L. Ed. 2d 235, Secured claims therefore have the highest level of priority in bankruptcy cases. Code § 361 and other sections are designed to prevent involuntary reduction in value of secured claims, which would violate the Takings Clause.

2. *Administrative expenses.* These are the actual, necessary costs and expenses of preserving the bankruptcy estate, and related expenses. Code § 503(b). After secured claims, administrative expenses have the second highest level of priority. Code § 507(a)(1). That essentially reflects the practical reality that if bankruptcy estates are to be administered, those who render such services require assurance that they will meet a better fate than other creditors of the debtor (although it often happens that administrative expenses also are not paid in full.)

3. *Priority claims.* Administrative expenses are a type of "priority" claim. Code § 507(a)(1). The term "priority claim", however, is generally used in this State as a term of art to refer to all of the types of claims defined in Code § 507(a)(2) through (8) which, for policy reasons, Congress has determined shall receive preferred treatment in distributions of a debtor's property. Tax claims generally fall under Code § 507(a)(7) (although they may also be secured claims under applicable nonbankruptcy law, or administrative expenses if they arise postpetition). Claims based upon

commitments to the Federal Deposit Insurance Corporation, Resolution Trust Corporation and related entities to maintain the capital of an insured depository institution fall under Code § 507(a)(8). *These are the only types of obligations of a debtor to governmental units which are given priority by the Bankruptcy Code.*

4. *Unsecured claims*. These are all other legal obligations of the debtor requiring payment of money. Code § 101(5). The Bankruptcy Code generally defers to nonbankruptcy law to determine the creation of legal obligations which give rise to claims. *In re Meyertech*, 831 F.2d 410, 417 (3d Cir. 1987). Code § 502(b), however, does limit certain types of claims.

5. *Equity interests*. These are essentially the ownership interests, primarily those reflected in capital stock in the case of a corporate debtor. Code § 101(16).

Code § 1129 in chapter 11 cases and Code § 726 in chapter 7 cases require that all distributions of money or other property from a bankruptcy estate must follow this order of priority (except to the extent that a particular class consents to different treatment under a chapter 11 plan).

Two fundamental conclusions follow from the Bankruptcy Code provisions dealing with classification of obligations and distribution of property of the estate. First, *every type of obligation requiring payment of money from a bankruptcy estate falls within one of the foregoing five categories; the Bankruptcy Code recognizes no other categories (except for co-ownership interests of third parties)*. Second, *where there is a dispute about whether money should be paid from a bankruptcy estate to satisfy a legal obligation, the first phase of the analysis must be to determine the category to which the obligation belongs*. With this background, we can proceed

to determine the nature of the debtor's obligation to clean up its former property under the Bankruptcy Code, and the treatment to which it is entitled in this case.

IV.
THE DEBTOR'S CLEANUP OBLIGATION TO THE STATE IS AN UNSECURED CLAIM.

The DEP issued its Administrative Order under the Solid Waste Management Act, N.J.S.A. 13:1E-1 *et seq.* ("the Solid Waste Act"), and regulations thereunder. Moreover, the DEP also alleges that the Debtor violated three other New Jersey environmental laws by the wrongful discharge of hazardous substances on the property: the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 *et seq.* ("ECRA"); the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.* ("the Spill Act"); and the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 *et seq.* ("the Water Pollution Act"). The Debtor denies that it violated any of those laws. However, for purposes of these motions for summary judgment the Debtor argues essentially that even if it did violate those laws, any resulting obligations it may have to the State of New Jersey are debts which are dischargeable in bankruptcy. The DEP argues that such obligations are not debts, but rather are "regulatory obligations" which are not dischargeable. The first question then is as to the definitions of the terms "debt" and "claim" under the Bankruptcy Code.

Code § 101(5) states that

> "claim" means--
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured;

> or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Code § 101(12) defines "debt" as "liability on a claim." Under Code § 101(10)(A), the term "creditor" means an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."[7] The legislative history expresses Congressional intent that "the terms debt and claim are coextensive: a creditor has a claim against the debtor; the debtor owes a debt to the creditor." 2nd Sess. 23 (1978); S. Rep. No. 95-589, 95th Cong., H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 310, 1978 U.S. Code Cong. & Admin. News 6267 (1977). Congress intended that these terms should be defined very broadly:

> By this broadest possible definition [of the term "claim"], and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

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[7] Code § 301 provides that in a voluntary bankruptcy case, the filing of the bankruptcy petition constitutes an order for relief under the chapter of the Bankruptcy Code under which the petition was filed.

S. Rep. No. 95-989, 95th Cong., 2d Sess. 21-22 (1978); H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 309, 1978 U.S. Code Cong. & Admin. News 6266 (1977).

In three recent cases, the United States Supreme Court has held that the term "claim" is to be defined as broadly as Congress intended. In *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990), the Supreme Court held that restitution obligations imposed as conditions of probation in state criminal actions are "debts" which are dischargeable under chapter 13 of the Bankruptcy Code. In so doing, the Court held that the fact that restitution orders are imposed for the benefit of the state as well as the victims makes no difference as to whether such obligations are "claims" in bankruptcy:

> But the language employed to define "claim" in § 101(4)(A) makes no reference to purpose. The plain meaning of "right to payment" is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation.

110 S. Ct. at 2131.

The Supreme Court reaffirmed this holding this year in *Johnson v. Home State Bank*, ____ U.S. ____, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991). The issue in *Johnson* was whether a debtor can include a mortgage lien in a chapter 13 bankruptcy reorganization plan once the personal obligation secured by the mortgaged property has been discharged in a chapter 7 proceeding. The Court held that in such a circumstance the mortgage lien remains a "claim" against the debtor that can be rescheduled under chapter 13. Code § 524(a)(1) provides that a bankruptcy discharge extinguishes "the personal liability of the debtor with respect to any debt," and the defendant argued that after such discharge, the obligation

secured by the remaining lien was no longer a "debt." The Court noted that Code § 102(2) establishes as a rule of construction that the phrase "'claim against the debtor' includes claim against property of the debtor." Hence, the fact that the defendant could still look to the debtor's real property as a source of payment meant that the defendant still had a "claim" against the debtor.

In both *Johnson* and *Davenport*, the Supreme Court relied on its holding in *Ohio v. Kovacs*, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985). In *Kovacs*, the State of Ohio obtained an injunction ordering William Kovacs to clean up a hazardous waste site. A receiver was subsequently appointed. Then Kovacs filed a bankruptcy petition. The Supreme Court stated that "[t]he question before us is whether in the circumstances present here, Kovacs' obligation under the injunction is a 'debt' or 'liability on a claim' subject to discharge under the Bankruptcy Code." *Id.* at 275, 105 S. Ct. at 706.

Kovacs was an officer and stockholder of a corporation which caused pollution in Ohio. The State obtained a consent judgment which required the corporation and Kovacs to cease polluting, to clean up the property, and to pay the State $75,000 in damages. When there was no compliance, Ohio appointed a receiver for Kovacs' assets to implement the judgment. When Kovacs filed a bankruptcy petition, Ohio sought a declaratory judgment that Kovacs' obligation under the injunction requiring cleanup was not a "debt." In a unanimous opinion, the Supreme Court held as follows:

> The State resorted to the courts to enforce its environmental laws against Kovacs and secured a negative order to cease polluting, an affirmative order to clean up the site, and an order to pay a sum of money to recompense the State for damage

> done to the fish population. Each order was one to remedy an alleged breach of Ohio law; and if *Kovacs'* obligation to pay $75,000 to the state is dischargeable in bankruptcy, which the State freely concedes, *it makes little sense to assert that because the cleanup order was entered to remedy a statutory violation, it cannot likewise constitute a claim for bankruptcy purposes. Id.* at 279, 105 S. Ct. at 708 [emphasis added].

The Court therefore held that the obligation of the debtor under the cleanup order was a "claim" which was dischargeable in bankruptcy.

In all three of these cases, the Supreme Court has held in no uncertain terms that any enforceable obligation to pay money is a "claim" of the obligee and a "debt" of the obligor under Code §§ 101(5) and (12), which can be discharged in bankruptcy. Moreover, the unanimous opinion of the Court in *Kovacs* is directly on point. In *Kovacs*, as in this case, the State was seeking to compel the debtor to pay money to clean up environmental contamination. In *Kovacs*, as in this case, there was no suggestion by the State that the debtor was personally capable of cleaning up the environmental damage which he may have caused. "In reality, the only type of performance in which Ohio is now interested is a money payment to effectuate the Chem-Dyne cleanup." *Id.* at 282.

The DEP argues that *Kovacs* is not controlling. It states that the *Kovacs* decision "is a very narrow one involving a money judgment and a chapter 7 individual debtor who had already been replaced with a receiver, by the state" before he filed his bankruptcy petition.[8] There is nothing in *Kovacs*,

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[8] DEP's brief dated December 6, 1990, page 12.

however, which suggests that its analysis of the terms "claim" and "debt" should be limited to chapter 7 cases or to cases involving individuals. Furthermore, Code 103(a) provides that chapter 1, which includes the definitions of "debt" and "claim" in Code § 101, applies in all cases under chapters 7, 11, 12 and 13.

It is true that the appointment of a receiver was relevant in *Kovacs*. Accordingly, the Court declined to "address what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed. . . ." *Id.* at 284. Consequently, the opinion is not entirely clear as to what the Court would have held if there had not been a receiver. Certain inferences, however, can be drawn from a close reading. The Court noted that William Kovacs was not the only person whose assets were placed in receivership:

> *William Kovacs was the chief executive officer and stockholder of Chem-Dyne Corp., which with other business entities* operated an industrial and hazardous waste disposal site in Hamilton, Ohio. In 1976, *the State sued Kovacs and the business entities* in state court for polluting public waters, maintaining a nuisance, and causing fish kills, all in violation of state environmental laws. *In 1979, both in his individual capacity and on behalf of Chem-Dyne, Kovacs signed a stipulation and judgment* entry settling the lawsuit. Among other things, *the stipulation enjoined the defendants* from causing further pollution of the air or public waters, forbade bringing additional industrial wastes onto the site, *required the defendants to remove specified wastes from the property*, and ordered the payment of $75,000 to compensate the State for injury to wildlife.

> *Kovacs and the other defendants failed to comply with their obligations under the injunction.* The State then obtained the appointment in state court of a receiver, *who was directed to take possession of all property and other assets of Kovacs and the corporate defendants and to implement the judgment entry by cleaning up the Chem-Dyne site. The receiver took possession of the site* but had not completed his tasks when *Kovacs* filed a personal bankruptcy petition.

Id. at 276, 175 S. Ct. at 706 [emphasis added]. Thus, it was significant that Chem-Dyne and other business entities operated the site in question, that the injunction required all of the defendants to clean up the site, and that the receiver took possession of all assets of Kovacs *and the corporate defendants, including* the site. The Supreme Court analyzed the effect that this had on any ability which Kovacs may otherwise have had to effect the cleanup:

> . . . the State secured the appointment of a receiver, who was ordered to take possession of all of *Kovacs'* nonexempt assets as well as the assets of the corporate defendants and to comply with the injunction entered against *Kovacs*. As wise as this course may have been, it *dispossessed Kovacs, removed his authority over the site, and divested him of assets that might have been used by him to clean up the property.* Furthermore, when the bankruptcy trustee sought to recover Kovacs' assets from the receiver, the latter sought an injunction against such action. Although Kovacs had been ordered to "cooperate" with the receiver, *he was disabled by the receivership from personally taking charge of and carrying out the removal of wastes*

> *from the property. What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs.* At oral argument in this Court, the State's counsel conceded that after the receiver was appointed, the only performance sought from Kovacs was the payment of money. Tr. of Oral Arg. 19-20. Had Kovacs furnished the necessary funds, either before or after bankruptcy, there seems little doubt that the receiver and the State would have been satisfied. *On the facts before it, and with the receiver in control of the site,* we cannot fault the Court of Appeals for concluding that the cleanup order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy.

Id. at 282-83, 105 S. Ct. at 709-10 [emphasis added].

It therefore appears that the receivership *raised a question as to whether Kovacs* could somehow have used the assets of the business entities to effectuate cleanup if he had not been precluded from doing so by the receivership. The opinion does not state what those assets were, and *the Court appears to have had a question as to whether such assets included equipment and other items which could have been used to clean up. Kovacs* was, however, ". . . disabled by the receivership from personally taking charge of and carrying out the removal of wastes from the property." *Id.* at 283, 105 S.Ct. at 710.

Since it was clear that as a result of the receivership the only way Kovacs could comply with the injunction would be to pay money, the injunction became a dischargeable monetary obligation. Quoting from the Court of Appeals, the Supreme Court stated:

> *"Ohio does not suggest that Kovacs is capable of personally cleaning up the environmental damage he may have caused. * * * In reality the only type of performance in which Ohio is now interested is a money payment to effectuate the Chem-Dyne cleanup.*
> *"The impact of its attempt to realize upon Kovacs' income or property cannot be concealed by legerdemain or linguistic gymnastics. Kovacs* cannot personally clean up the waste he wrongfully released into Ohio waters. He cannot perform the affirmative obligations properly imposed upon him by the State court except by paying money or transferring over his own financial resources. The State of Ohio has acknowledged this by its steadfast pursuit of payment as an alternative to personal performance." *[In re Kovacs]* 717 F.2d [984] at 987-988 [6th Cir. 1983]. *As we understand it, the Court of Appeals held that in the circumstances the cleanup duty had been reduced to a monetary obligation. We do not disturb this judgment.*

Id. at 282 [emphasis added].

This court concludes from the foregoing that the holding in *Kovacs* is that where a debtor in bankruptcy cannot clean up environmental contamination himself or itself without paying money, the obligation to clean up pursuant to an injunction is a debt which is dischargeable in bankruptcy. Since the definitions of "claim" and "debt" are the same regardless of the chapter in which the case is pending or the nature of the debtor, this holding applies to corporate debtors as well.[9]

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[9] In some chapter 11 cases in which the debtor is reorganizing, the court must address the relationship between *Kovacs* and 28 U.S.C. § 959(b), (continued...)

The DEP argues that a different result is required by *Penn Terra Ltd. v. Dept. of Envtl. Resources*, 733 F.2d 267 (3d Cir. 1984). In that case, the debtor operated coal mines in Pennsylvania. That state's Department of Environmental Resources ("DER") entered into a consent order with the debtor which required it to take certain actions to correct violations of state environmental laws. The debtor did not comply with the consent order, ceased operations and filed a petition for liquidation under chapter 7 of the Bankruptcy Code. The debtor's remaining assets consisted of $13,500 which it had furnished to the DER as bonds for its obligations under the consent order, and $500 of other unidentified assets. The cost of cleanup was greatly in excess of the bonds.

After the bankruptcy petition, the DER brought an action in state court to compel the debtor to clean up. The state court granted injunctive relief requiring such cleanup. The debtor then filed an application to hold the DER in contempt for violating the automatic stay of Bankruptcy Code § 362(a). The DER argued that the state court proceedings and injunction fell within the exceptions to the automatic stay in Code §§ 362(b)(4) and (5) for certain actions by governmental units pursuant to their police or regulatory powers. The bankruptcy court enjoined the DER from enforcing the state court injunction on the grounds that the debtor did not have

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[9] (...continued)
which requires that a debtor in possession operate according to the valid laws of the state in which such property is situated. See this court's opinion in *In re Heldor Industries, Inc.*, 131 B.R. 578, rendered on the same date as this opinion. That section, however, is not applicable in this case because the debtor has not been in possession of the subject property since September 1985, almost four years before the filing of the bankruptcy petition.

sufficient funds to comply with it. The district court affirmed, but the Court of Appeals reversed. It held that the term "money judgment" in Code § 362(b)(5) is to be construed narrowly, so that enforcement of a cleanup order other than a money judgment could proceed without obtaining relief from the automatic stay.

Penn Terra was issued before the Supreme Court's decision in *Kovacs*. *Penn Terra* distinguished the Sixth Circuit's opinion in *Kovacs* in a footnote, stating simply that "since different sections of the Bankruptcy Code are at issue which involve different policies and considerations, we are not prepared to declare that our decision is in conflict" with the Sixth Circuit's decision in *Kovacs*. *Penn Terra*, *supra*, 733 F.2d at 277 n. 11. Similarly, in affirming the Sixth Circuit the Supreme Court distinguished *Penn Terra*:

> . . . in that case, [i.e. *Penn Terra*], there had been no appointment of a receiver who had the duty to comply with the state law and who was seeking money from the bankrupt. The automatic stay provision does not apply to suits to enforce the regulatory statutes of the State, *but the enforcement of such a judgment by seeking money from the bankrupt -- what the Court of Appeals for the Sixth Circuit concluded was involved in this case -- is another matter.*

Kovacs, *supra*, 469 U.S. at 283 n. 11 [emphasis added]. Thus, the Supreme Court interpreted *Penn Terra* as a case in which the state was not seeking money from the debtor. The court makes it clear that if the DER had been seeking money from the debtor, the automatic stay would have barred such an action.

This renders the relationship between *Kovacs* and *Penn Terra* unclear at first blush. The question is, if a cleanup

order can only be implemented by the debtor paying money, does it make any difference for purposes of classification of that obligation under the Code whether the debtor pays a state-appointed receiver or a cleanup specialist to fulfill the obligation? The DEP has consistently taken the position in this court that *Kovacs* only applies in cases in which state-appointed receivers spend the debtor's money to clean up (which is rare), and that *Penn Terra* is the general rule, requiring the debtor to employ and pay a private cleanup specialist under Code § 362(b)(4) and (5). The DEP argues that the cleanup obligation is an unsecured claim only if a state-appointed receiver has seized the debtor's assets, and that the obligation has some higher priority if there has been no such seizure. However, there is nothing in *Kovacs* or the Code to suggest that a cleanup obligation should receive preferred treatment in bankruptcy if the debtor spends the money to effect cleanup, but not if the state seizes and spends the debtor's money. Such a distinction has no sound basis in law or logic.

This court, therefore, believes that the DEP has distorted the relationship between these cases. In a unanimous opinion, the Supreme Court held in *Kovacs* that where the debtor cannot perform a cleanup without payment of money, a cleanup order is a monetary obligation which is dischargeable in bankruptcy. *Id.* at 283. The Supreme Court also concluded that by seeking to compel payment, ". . . the State seeks to enforce his cleanup obligation by a *money judgment*." *Id.* at 283 [emphasis added]. Comparison of the cases reveals that the Supreme Court's definition of "money judgment" in *Kovacs* is much broader than the Third Circuit's definition in *Penn Terra*. In *Penn Terra*, the Third Circuit held that "a money judgment is an order entered by the court or by the clerk, after a verdict has been rendered for plaintiff, which adjudges that the defendant shall pay a

sum of money to the plaintiff." *Penn Terra*, *supra*, 733 F.2d at 275. It further held that "the adjudication of liability for a sum certain [is] an essential element of a money judgment." *Id.* The Third Circuit ascertained that "the definition of 'money judgment' implied in [the Sixth Circuit's opinion in] *Kovacs* and adopted by the bankruptcy court is unduly broad." *Id.* 469 U.S. at 277. The Third Circuit added the following comment regarding the Sixth Circuit's definition of "money judgment" in *Kovacs*:

> Nor are we prepared to predict that the Sixth Circuit, if confronted with the issue that is presented in this case, would hold that the commonwealth was *enforcing a money judgment by requiring compliance with an environmental injunction. We would disagree with such a result if it did so*, for the reasons we have expressed in text. (*Id.* at 275 n. 11 emphasis added).

After *Penn Terra* was written, however, the Supreme Court affirmed and adopted *the Sixth Circuit's definition of "money judgment" in Kovacs*. The cleanup order at issue in *Kovacs* was not "an adjudication of liability for a sum certain," and it therefore did not meet *Penn Terra*'s definition of "money judgment." Furthermore, the Supreme Court held that "it makes little sense to assert that because the cleanup order was entered to remedy a statutory violation, it cannot likewise constitute a claim for bankruptcy purposes." *Kovacs*, *supra*, 469 U.S. at 279. Because Ohio sought payment of money to effectuate a cleanup, "the cleanup order had been converted into an obligation to pay money. . . ." *Id.* at 283, 105 S. Ct. at 710. That obligation had become a money judgment: ". . . the State seeks to enforce his cleanup obligation by a money judgment." *Id.* at 285, 105 S. Ct. at 711.

In *Kovacs*, the Supreme Court distinguished *Penn Terra*'s holding that the automatic stay does not apply to suits to enforce state regulatory statutes including the entry of money judgments under Code § 362(b)(5). *However, the Supreme Court clearly defined "money judgment" more broadly than the Third Circuit did in Penn Terra.* Although *Penn Terra* still stands for the proposition that a state can enforce a cleanup order against a bankruptcy estate under Code § 362(b)(5) without obtaining relief from the automatic stay, *Kovacs* now defines "money judgment." Thus, if a cleanup order entered under Code § 362(b)(5) requires that the debtor spend money, a determination must be made as to whether the cleanup order is a "money judgment" under the *Kovacs* definition.[10]

The significance of the definition of "money judgment," of course, is that if an obligation is not a money judgment, the state is not automatically stayed by Code § 362(a) from ordering a debtor to fulfill the obligation. A money judgment, however, is only a form of claim. Where, as in *Kovacs*, a claim is a general unsecured claim, it is not entitled to any better treatment under the Bankruptcy Code than other claims of the same level of priority. *Southern Ry. Co. v. Johnson Bronze Co.*, 758 F.2d 137, 141 (3d Cir. 1985). The Third Circuit noted further that "*Penn Terra* does not deal with the priority to be afforded to a claim against the estate for the cost of an environmental cleanup."

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[10] The debtor had no money to spend in *Penn Terra*, the case was in chapter 7, and there were presumably no further operations. What, then, did the DER accomplish in *Penn Terra*? For one thing, since the Third Circuit required that the automatic stay be vacated, the DER -- which was a secured creditor to the extent of $13,500, in bonds -- presumably applied the bonds to payment for cleanup. However, since there were no other assets, the cleanup order was meaningless beyond that.

Id.[11] If the state can compel satisfaction by a bankruptcy estate of cleanup obligations which are unsecured claims, the state can effectively overrule the Bankruptcy Code system of classification and payment of obligations by designating an obligation underlying an unsecured claim as "regulatory" in nature. Since the Bankruptcy Code does not afford any priority to environmental cleanup obligations, permitting the state to effectively remove such obligations from the Code

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[11] Environmental cleanup obligations can have a priority higher than that of unsecured claims under certain circumstances. Such obligations can be secured by statutory liens. *Kovacs*, *supra*, 469 U.S. at 285-86 (O'Connor, J., concurring). *see also* the Spill Act, N.J.S.A. 58:10-23.1-1f(f), and Comment, "State 'Superlien' Statutes: An attempt to Resolve the Conflict between the Bankruptcy Code and Environmental Law," 59 Temp. L. Q. 981 (1986). In addition, the cost of cleaning up any contamination which occurs postpetition will be an administrative expense under Code § 503(b). *In re Pierce Coal and Const., Inc.*, 65 B.R. 521 (Bkrtcy. N.D.W.Va. 1986). *see also In re United Trucking Service, Inc.*, 851 F.2d 159 (6th Cir. 1988). *But see In re T. P. Long Chemical, Inc.*, 45 B.R. 278 (Bkrtcy. N.D.Ohio 1985), holding that the cost of cleaning up prepetition contamination is also to be treated as an administrative expense. For the reasons set forth in this opinion, this court disagrees with the decision in *T.P.Long*.

For an insightful discussion of this and related issues, and other case citations, *See* Mirsky, Conway and Humphrey, "The Interface Between Bankruptcy and Environmental Laws," 46 The Bus. Law. 626, 648 (1991) and Comment, "Toxic Tug-of-War: Environmental Cleanup Costs, Bankruptcy and the Administrative Expense Priority -- Is It a Collision of Conflicting Policies or Just Plain Confusion?", 21 Seton Hall Law Rev. 832 (1991).

The burden of proving entitlement to administrative expense status is on the claimant. *Matter of Patch Graphics*, 58 B.R. 743, 745 (Bkrtcy. W.D.Wis. 1986); *In re Transouth Truck Equipment, Inc.*, 87 B.R. 937 (Bkrtcy. E.D.Tenn. 1988). Similarly, the burden of proving the existence of a lien is on the claimant. *See* Code § 363(o)(2).

classification and payment provisions by designating such obligations as "regulatory" would violate the Code.

It follows that obligations to clean up environmental contamination which occurred prepetition, and which can only be satisfied by spending money, should generally be defined as money judgments for purposes of Code § 362(b)(-5), rather than as other types of claims. Otherwise, injunctive relief would be required under Code § 105(a) in all of these cases to prevent violation of the Bankruptcy Code provisions regarding priority of payment. Congress could not have intended such a result.

Moreover, this analysis takes into account the relationship among Code §§ 362(a)(1), (a)(2), (a)(3), (b)(4) and (b)(5). Subsections (b)(4) and (b)(5) of § 362 provide that the automatic stay of § 362(a)(1) and (a)(2) do not apply to actions to enforce police and regulatory powers. Subsections 362(a)(1) and (a)(2) merely deal with the commencement or continuation of the police or regulatory action. *(b)(4) and (b)(5), however, do not provide an exception to 362(a)(3),* which enjoins "*any act* to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."[12] If subsection 362(a-)(3) enjoins any such acts, it makes no difference whether the state is attempting to compel cleanup through payment of money to the state itself or to some third party who will perform the cleanup; either way, the automatic stay of § 362(a)(3) still applies, and the court must approve the expenditure as justified under the Code's classification and distribution scheme if there is any dispute about it.

The DEP also argues that cleanup is required under *Midlantic Nat'l. Bank v. New Jersey Dept. Envtl. Protection*,

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[12] *See* Mirsky, Conway and Humphrey, n. 11 *supra*, at 638-39.

106 S. Ct. 755 (1986), 474 U.S. 494, 88 L. Ed. 2d 859, Although *Midlantic* can be reconciled with *Kovacs*,[13] it is unnecessary to do so in this case, because *Midlantic* is distinguishable for a very basic reason. In *Midlantic*, the trustee was attempting to abandon property under Code § 554. Abandonment is "the release from the debtor's estate of property previously included in that estate." 2 W. Norton, Bankruptcy Law and Practice, § 39.01 (1984). *Midlantic* created a narrow exception to the abandonment power for certain types of environmental obligations. However, there can be no abandonment unless the estate has some property interest to abandon. In this case, the debtor has had no such interest for years. Hence, *Midlantic* is obviously not applicable.

V.
THE DEP'S CLAIM IS TIME-BARRED

Bankruptcy Rule 3003(c)(2) provides that any creditor whose claim is scheduled as disputed must file a proof of claim within the time prescribed by the court. Bankruptcy Rule 2002(a)(8) requires that the court clerk must give not less than 20 days notice by mail of the time fixed for filing proofs of claims under Rule 3003(c). In this case, the clerk mailed the order and notice of the bar date to the Attorney General and the DEP, but they have no record of receipt of the order, and hence they deny service.

Bankruptcy Rule 9006(e) provides that service of notice by mail is complete on mailing. There is a presumption that an item which is mailed to an accurate address has been received by the addressee. *Hagner v. United States*, 285

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[13] See this court's opinion in *In re Heldor*, 131 B.R. 578, rendered on the same date as this opinion.

U.S. 427, 76 L. Ed. 861, 52 S. Ct. 417 (1932). That presumption has been recognized in a long line of bankruptcy cases, and denial of receipt does not rebut the presumption. *In re Longardner & Associates*, 855 F.2d 455 (7th Cir. 1988), *cert. denied* 489 U.S. 1015, 103 L. Ed. 2d 191, 109 S. Ct. 1130 (1989); *In re Ricketts*, 80 B.R. 495 (9th Cir. B.A.P. 1987); *In re Robintech*, 69 B.R. 663 (1987), *rev. on other grounds* 863 F.2d 393, *cert. denied* 493 U.S. 811, 110 S. Ct. 55, 107 L. Ed. 2d 24 (1987); *United States v. Cresta*, 40 B.R. 953 (Bkrtcy.E.D.Pa. 1984); *In re Thole*, 31 B.K. 548 (Bkrtcy.D.Minn. 1983); *In re Cleary*, 18 B.R. 114 (Bkrtcy.W.D.Pa. 1982); *In re Heyward*, 15 B.R. 629 (Bkrtcy.E.D.N.Y. 1981); *In re Torres*, 15 B.R. 794 (Bkrtcy-.E.D.N.Y. 1981); *American Family Insurance Group v. Gumieny, (In re Gumieny)*, 8 B.R. 602 (Bkrtcy. E.D.Wis. 1981). The rule is apparently to the contrary in the Sixth Circuit, according to *In re Yoder Co.*, 758 F.2d 1114 (6th Cir. 1985). That case, however, is distinguishable on its facts, because there was no proof that the notice was actually mailed to the creditor, and his name was not listed on the matrix of creditors filed with the court. To the extent that *Yoder* contains language extending its holding to cases where mailing is proven, it is clearly the minority view, and its reasoning is unpersuasive.

> If a party were permitted to defeat the presumption of receipt of notice resulting from the certificate of mailing by a simple affidavit to the contrary, the scheme of deadlines and bar dates under the Bankruptcy Code would come unraveled.

Ricketts, supra, 80 B.R. at 497.

The Court, therefore, finds that the State of New Jersey was served through the Attorney General and DEP with the order setting the bar date for filing proofs of claim, together

with notice that its claim was disputed and that it had to file a proof of claim by January 2, 1990. Since the State failed to file such a claim, Bankruptcy Rule 3003(c)(2) provides that the State shall not be treated as a creditor with respect to such claim for purposes of voting on any plan of reorganization and distribution of funds thereunder.[14]

VI.
THE SECTIONS OF ECRA, AND REGULATIONS AND ADMINISTRATIVE ORDERS THEREUNDER WHICH PURPORT TO LIMIT THE EFFECT OF BANKRUPTCY ON CLEANUP OBLIGATIONS, AND WHICH PURPORT TO CREATE NEW OBLIGATIONS WHEN A BANKRUPTCY CASE IS FILED, VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

This opinion has thus far held that in a bankruptcy case, a cleanup obligation arising from prepetition environmental contamination is a claim which is subject to the Bankruptcy Code provisions regarding classification, distribution and dischargeability. ECRA, however, says otherwise. N.J.S.A. 13:1K-12, entitled "Obligations imposed by act not affected by bankruptcy proceedings and constitute continuing regulatory obligations imposed by state," provides as follows:

> No obligations imposed by this act shall constitute a lien or claim which may be limited or discharged in a bankruptcy proceeding. All obligations imposed by this act shall constitute continuing regulations imposed by the State.

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[14] For a general discussion of the filing of proofs of claim by environmental creditors, *see* Mirsky, Conway & Humphrey, n. 11 *supra*, at 670-71.

It is therefore necessary to consider the relationship between that section of ECRA and the relevant sections of the Bankruptcy Code.

The United States Constitution, Article VI, Clause 2, provides that "this Constitution, and the Laws of the United States, which shall be made in pursuance thereof . . . shall be the supreme Law of the Land." Article VI, Clause 2 of the Constitution is generally referred to as the Supremacy Clause. "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Perez v. Campbell*, 402 U.S. 637, 91 S. Ct. 1704 (1971), 29 L. Ed. 2d 233. If either the purpose or the effect of a state statute interferes with the effectiveness of a federal statute, the state statute is rendered invalid by the Supremacy Clause. *Id.* at 652.

In Perez, the plaintiff was involved in an automobile accident in Arizona which resulted in a judgment against Perez for injuries and property damage suffered by others involved. Perez did not have liability insurance. He later filed a bankruptcy petition under the Bankruptcy Act, the predecessor to the Bankruptcy Code, and received a discharge of the tort judgment. However, Arizona's Motor Vehicle Safety Responsibility Act required payment of such judgments and provided that the judgment debtor's driver's license and registration shall be suspended until such payment. § 28-1163(B) of the Arizona Act also provided that "[a] discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this Article."

The Court found that the purpose of the Arizona Act was the protection of the public using the highways from

financial hardship which may result from the use of the automobile by financially irresponsible persons. *Id.* at 644 (quoting *Schecter v. Killingsworth*, 93 Ariz. 273, 280, 380 P.2d 136, 140 (1963)). The Court also found that one of the purposes of the Bankruptcy Act was to give debtors a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. *Id.* 402 U.S. at 648. The Court stated that its function is to determine whether a challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.* at 649, 91 S. Ct. at 1711. The Court concluded that the Arizona Act had both the purpose and the effect of giving judgment creditors a powerful weapon with which to force bankrupts to pay their debts despite their discharge. *Id.* at 654. Hence, § 28-1163-(b) of the Arizona Act was unconstitutional.

By comparison, the primary purpose of ECRA is to ensure cleanup of property which has been contaminated by hazardous substances or wastes by requiring the execution of an approved cleanup plan as a precondition to the closure, sale or transfer of such property. Senate Energy and Environment Committee Statement, Assembly No. 1231-L. 1983, c.330, *printed in* N.J.S.A. after 13:1K-6. To that end, "the bill further requires the owners of hazardous substance or waste operations to obtain a surety bond or other financial security which should guarantee the implementation of the cleanup plan." *Id.* Although the Committee Statement does not refer to N.J.S.A. 13:1K-12, it is clear that its purpose is to further the express requirement of financial security for cleanup obligations by stating that a bankruptcy proceeding shall not discharge, limit or affect an obligation imposed by ECRA.

The primary purposes of the Bankruptcy Code are to give debtors a fresh start and to provide for an orderly and

equitable distribution of their assets among creditors. *See generally* Weintraub & Resnick, Bankruptcy Law Manual, para. 1-3 and para. 8-89 (1986). To those ends, "claim" is defined very broadly as, essentially, any right to payment. Code § 101(5)(A). As previously noted, the Supreme Court held in *Davenport* that "the plain meaning of 'right to payment' is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation." 110 S. Ct. at 2131. Moreover, the Code also defines "liens" for bankruptcy purposes. "'Lien' means charge against or interest in property to secure payment of a debt or performance of an obligation." Code § 101(33). The legislative history to § 101(33) states:

> the definition is new and very broad. A lien is defined as a charge against or interest in property to secure payment of a debt or performance of an obligation. It includes inchoate liens.

H.R. Rep. No. 595, 95th Cong. 1st Sess. 312 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 25 (1978). Thus, Congress has determined what shall constitute claims and liens for bankruptcy purposes, and those definitions are very broad. The purpose of such breadth is to deal in bankruptcy cases with all obligations of the debtor requiring payment of money. By attempting to dictate that cleanup obligations triggered by ECRA do not fall within those definitions, and hence are not affected by bankruptcy, N.J.S.A. 13:1K-12 plainly has both the purpose and effect of interfering with the Bankruptcy Code provisions in question.[15]

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[15] Although N.J.S.A. 13:1K-12 says a cleanup obligation imposed by ECRA is not a lien, it is arguable that it is a lien within the broad (continued...)

[15] (...continued)
definition of Code § 101(33), since it is arguably a "charge against" or "interest in" property. Albeit ECRA refuses to call the obligation a lien, it nevertheless treats it like one by providing that unless the obligation is satisfied prior to a transfer of the subject property, the transferee can void the sale and recover damages. *See* N.J.S.A. 13:1K-13 (West Supp. 1991). Such rights are similar to the rights that the holder of an unsatisfied lien would have, in that the lien would remain a charge against the property notwithstanding the transfer. The obligation might be construed as an inchoate lien. *See Simon v. Oldmans Tp.*, 203 N.J. Super. 365, 375, 497 A.2d 204, 210 (Ch. Div. 1985) (the existence of contamination covered by the Spill Act creates "the potential existence of a super lien" which must be disclosed to a purchaser).

ECRA and the other state environmental statutes do not create the obligation to clean up contamination; they merely provide procedures for enforcement of it. The state has an inherent right to require remediation of injuries to the environment. *See Department of Envtl. Protection v. Ventron Corp.*, 94 N.J. 473, 499, 468 A.2d 150 (1983) ("the Spill Act does not so much change substantive liability as it establishes new remedies for activities recognized as tortious both under prior statutes and the common law.") *see also Lansco, Inc. v. Dept. of Envtl. Protection*, 138 N.J. Super. 275, 283, 350 A.2d 520, 524 (Ch. Div. 1975), *aff'd.* 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976) *cert. denied* 73 N.J. 57, 372 A.2d 322 (1977). The Spill Act, N.J.S.A. 58:10-23.11 *et seq.* covers the same hazardous substances as ECRA, and provides that if the state cleans up the contamination itself, it has a first lien on the subject property to the extent of the cost of cleanup when a notice of lien is filed. N.J.S.A. 58:10-23-11f(f) (West Supp. 1991). *See Superior Air Prod. v. NL Industries*, 216 N.J. Super. 46, 522 A.2d 1025 (App. Div. 1987) (analyzing the relationship between ECRA and the Spill Act). It is arguable that the state therefore has an inchoate statutory lien for cleanup obligations which are the subject of the Spill Act and ECRA, and which have not been cleaned up by the State under the Spill Act. That is exactly how purchasers and sellers of industrial establishments treat the obligation, because purchasers will not close until the obligation is satisfied or an administrative consent order is entered. However, if the

(continued...)

For the same reasons, the provisions in N.J.S.A. 13:1K-12 to the effect that cleanup obligations cannot be limited or discharged in bankruptcy also conflict with the Code. Code sections 1141(d), 727 and 523 specify which obligations shall and shall not be discharged, and they contain no reference to environmental cleanup obligations.

By defining cleanup obligations as "continuing regulatory obligations" in N.J.S.A. 13:1K-12 the State of New Jersey apparently wanted "continuing regulatory obligations" to be treated as some new class of obligations for bankruptcy purposes which transcend the categories set forth in the Bankruptcy Code as described in Section III, *supra*. This the State cannot do. To the extent that they require expenditure of a bankruptcy estate's money, even "continuing regulatory obligations" are either secured claims, administrative expenses, priority claims or unsecured claims as defined by Congress, and are subject to the provisions of the Bankruptcy Code regarding payment.

Because N.J.S.A. 13:1K-12 conflicts with the Bankruptcy Code in both its purpose and its effect, it violates the Supremacy Clause and is void on its face.[16]

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[15] (...continued)
obligation is not a lien, it is not because N.J.S.A. 13:1K-12 so states; it will be because the courts determine that the intention of Congress in enacting Code § 101(33) was to exclude such charges against property from the definition of lien. For purposes of this case, it is assumed that the obligation is not a lien, without deciding the question.

[16] To the extent that *Matter of Borne Chemical Co.*, 54 B.R. 126 (Bkrtcy. D.N.J. 1984) held to the contrary, this court disagrees with it and declines to follow it for the reasons set forth herein. *Borne Chemical*, however, compared the Code with ECRA generally, without focusing on the sections of ECRA addressed herein. This court does not
(continued...)

Moreover, the other provisions of ECRA, its regulations and orders which provide for treatment of cleanup obligations in bankruptcy meet the same fate. N.J.S.A. 13:1K-8(b) states that ECRA is triggered by the filing of a bankruptcy petition. N.J.A.C. 7:26B-1.6 specifies the proceedings or events in any bankruptcy proceeding which trigger ECRA. N.J.A.C. 7:26B-1.8(A)(4) provides that any corporate reorganization not substantially affecting ownership or control of the industrial establishment does not trigger ECRA. And N.J.A.C. 7:26B-1.3 states that:

> "corporate reorganization not substantially affecting ownership" means the restructuring or reincorporation by the board of directors or the shareholders of a corporation, *which does not diminish the availability of assets for any environmental cleanup, diminish the Department's ability to reach those assets, or otherwise hinder the owner's or operator's ability to cleanup the industrial establishment*. . . . [emphasis added].

Reading these provisions together with N.J.S.A. 13:1K-12, the obvious intent of the State of New Jersey and the DEP is to provide that when a bankruptcy petition is filed, ECRA is

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[16] (...continued)
suggest that sections of ECRA other than those addressed herein are unconstitutional. Moreover, unlike *Borne Chemical*, this opinion does not address cases in which a debtor in possession or trustee is selling or assigning contaminated real property. While this court's determinations as to the effect of ECRA on such sales and assignments will be informed in part by the analysis in this opinion, such transfers raise questions which are beyond the scope of this case. There are compelling reasons to require trustees and debtors in possession to comply with ECRA as a condition to such transfers, and compliance in those cases may be consistent with this opinion for reasons not addressed herein.

triggered, and either the cleanup obligation must be satisfied or the debtor's assets must remain intact and subject to the Department's ability to reach them. Both the purpose and the effect of these provisions is to require that cleanup obligations must either receive the highest priority in bankruptcy cases, or be undisturbed by them. For the reasons previously stated, the State cannot limit the definitions, purposes and effect of the Bankruptcy Code in that manner. All of the subject provisions are therefore void under the Supremacy Clause to the extent that they purport to dictate the treatment of cleanup obligations in bankruptcy cases. For the same reasons, the Administrative Order which was entered in this case, and which purported to dictate its own treatment in bankruptcy, is also void.[17]

VII.
CONSIDERATIONS REGARDING THE RELATIONSHIPS AMONG THE FEDERAL AND STATE LEGISLATURES AND THE COURTS.

It is appropriate to add certain additional observations, to place the foregoing analysis and conclusions in the proper context. This court does not dispute that contamination of the environment is a matter of grave concern to this country

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[17] Alternatively, if the cleanup obligation is an inchoate lien which becomes choate under ECRA when a bankruptcy petition is filed, *see n.* 15 *supra*, it is voidable under Code § 545(1)(A). Other so-called "ipso facto" clauses of statutes or contracts which are triggered by the filing of a bankruptcy petition are also void in bankruptcy. *See* 11 U.S.C. §§ 365(b)(2)(A), 365(e)(1)(A) and 541(c)(1)(B); *In re Texaco*, Inc., 73 B.R. 960, 968 (Bkrtcy. S.D.N.Y. 1987).

and this state.[18] There are of course different degrees of danger presented by different types of contamination, but the worst forms can be life threatening. However, *the ultimate issue in cases such as this is not whether contamination should be cleaned up, but who must pay for it.* By attempting to compel bankruptcy estates to clean up contamination,

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[18] Arguments, however, are being made with increasing frequency in this State that environmental concerns are being exalted by state law over other public policy concerns to an extent which extracts too great of a price. An example follows from a recent New Jersey Law Journal editorial entitled "The New Religion":

> For the past 20 years or so the protection of the environment has taken on many of the attributes of a religion. Its adherents, the environmentalists, have aligned themselves against the purported forces of darkness and evil. Those who question the faith are castigated and ridiculed as heretics and worse -- the very despoilers of mother earth.
>
> Nowhere has this passion play run as long and as consistently as in New Jersey. And we would be remiss if we failed to recognize that which is popular is also politically expedient. Our candidates for elective office have tripped over themselves extolling their environmental records and trumpeting the strength of their commitment.

128 N.J.L.J., at 1218. (August 22, 1991). The editorial goes on to suggest that the state government's approach to environmental questions may have contributed to New Jersey's loss of almost 200,000 jobs in two years. The editorial urges greater balance and moderation by New Jersey state government in weighing economic and environmental concerns.

This court expresses no opinion on this controversy, and merely notes its existence. If it is true, however, that the state government's approach to environmental concerns has contributed to the recession and consequent loss of employment in this State, then it would follow that that approach has also contributed to the unprecedented explosion in the number of bankruptcy cases filed in this State in the last several years.

as opposed to having the state do so, the DEP is at least as concerned with the public fisc as with the public health.[19] The DEP admits as much: "Public money is scarce; necessary cleanups abound."[20] Both concerns are of course important, but they do not enable the DEP to rewrite the Bankruptcy Code. Nor can the courts do so:

> [Courts] are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond that is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge it nor contract it.

F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L.Rev. 527, 533-34 (1947). For that reason, it has been held in this Circuit that the courts may not create a new priority of payment in bankruptcy where the Congressional mandate is clear that no such priority shall be accorded.

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[19] *Midlantic Nat'l. Bank v. New Jersey Department of Envtl. Protection*, 474 U.S. 494, 507, 106 S. Ct. 755 (1986), 88 L. Ed. 2d 859 (Rehnquist, J., dissenting); *In re Anthony Ferrante & Sons, Inc.*, 119 B.R. 45, 50 (D.N.J. 1990).

[20] Brief of DEP filed March 8, 1991, at 32. It should also be noted that there are often other parties who are also responsible for cleanup, including any owner or operator other than the debtor, *see* N.J.S.A. 13:1K-9, and prior owners or tenants who caused or contributed to contamination. *See, e.g. Superior Air Prod. v. NL Industries*, 216 N.J. Super. 46, 522 A.2d 1025 (App. Div. 1987).

Southern Ry. Co. v. Johnson Bronze Co., supra; In re Columbia Ribbon Co., 117 F.2d 999, 1002 (3d Cir. 1941). For the same reason, the courts cannot create a new priority for payment of environmental obligations, no matter how compelling the public policy concerns reflected in New Jersey's environmental laws.

We have recently seen a classic example of the proper relationship between the judicial and the legislative branches in situations such as this. In *Davenport, supra*, the Supreme Court held that restitution orders imposed as a condition of probate in state criminal proceedings were "claims" dischargeable in a chapter 13 case. Congress subsequently overruled the result in *Davenport* by withdrawing the power to discharge restitution orders in chapter 13, rather than by restricting the definition of "claim" under the Code. *See* Criminal Victims Protection Act of 1990, Pub.L. 101-581, § 3, 104 Stat. 2865. *See also Johnson, supra* 111 S. Ct. at 2154, n. 4. If a federal statute needs to be changed, that is how it should be done.

The respective roles of the state and federal legislatures and the courts in this situation can be summarized as follows. A state legislature can determine whether environmental contamination creates legal obligations. *Only* Congress, however, can determine whether such obligations constitute claims for bankruptcy purposes, and their priority and dischargeability in bankruptcy cases. A state legislature can determine whether environmental obligations shall be secured by liens on a debtor's property. *Only* Congress, however, can determine how such liens shall be treated in bankruptcy cases. And if there is a question as to whether particular obligations are claims or liens for bankruptcy purposes, the definitions provided by Congress in Code § 101 shall be dispositive. The obligation of the courts is to fulfill the

legislative intent within that framework, without substituting their own views of what the statutes should provide.

For the foregoing reasons, the Debtor's motion for summary judgment is granted, and the DEP's motion is denied. This adversary proceeding is closed. The Debtor is to submit an order under the five-day rule.

[SEAL]

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF HAZARDOUS WASTE MANAGEMENT
Lance R. Miller, Acting Director
CN 028
Trenton, N.J. 08625-0028
Fax # (609) 633-1454

IN THE MATTER OF	:	ADMINISTRATIVE ORDER AND NOTICE OF CIVIL ADMINISTRATIVE PENALTY ASSESSMENT
Torwico Electronics, Inc.	:	
410 Oberlin Avenue South	:	
Lakewood, NJ 08701	:	

This Administrative Order and Notice of Civil Administrative Penalty Assessment is issued pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection (hereinafter "NJDEP" or the "Department") by N.J.S.A. 13:1D-1 *et seq.*, and the Solid Waste Management Act, N.J.S.A. 13:1E-1 *et seq.* and duly delegated to the Assistant Director for Enforcement of the Division of Hazardous Waste Management pursuant to N.J.S.A. 13:1B-4.

FINDINGS

1. The Department has determined that Torwico Electronics, Inc. (hereinafter "Torwico") is a generator of hazardous waste as defined in N.J.A.C. 7:26-1.4. Torwico was located at Block 1160.03, Lot 47, 1515

Route 70, Township of Lakewood, County of Ocean, State of New Jersey, with EPA *Id#* NJD002387108. In September 1985, Torwico relocated to Block 1600, Lot 12, 410 Oberlin Avenue South, Township of Lakewood, County of Ocean, State of New Jersey.

2. On November 13, 1989, a Department representative conducted investigations at both the former and present sites, referenced in paragraph 1 above, and noted the following:

   a. Torwico treated, stored, disposed of, transported or offered for transportation, hazardous waste without having received an EPA identification number. Specifically, Torwico failed to obtain a new EPA *Id* number for its new operating location, in violation of N.J.A.C. 7:26-7.4(a)1.

   b. Torwico caused, suffered, allowed or permitted the construction, installation, modification or operation of a hazardous waste facility without having submitted Part A and B of a permit application. Specifically, Torwico disposed of hazardous wastes into the seepage pit located in the former site, without first obtaining a permit to operate a hazardous waste facility, in violation of N.J.A.C. 7:26-12.1-(a).

3. Based on a letter dated January 10, 1990 from Torwico, the Department has determined that Torwico has attained compliance with the violation of N.J.A.C. 7:26-7.4(a)1.

4. To this date, Torwico has not attained compliance with the violation of N.J.A.C. 7:26-12.1(a).

5. Based on the facts set forth in these FINDINGS, the Department has determined that Torwico has violated the

Solid Waste Management Act, N.J.S.A. 13:1E-1 *et seq.*, and the regulations promulgated pursuant thereto, N.J.A.C. 7:26-1 *et seq.*, specifically N.J.A.C. 7:26-7.4(a)1 and 12.1(a).

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT TORWICO SHALL:

6. Within fifteen (15) calendar days upon receipt of this Administrative Order, submit a written closure plan pursuant to N.J.A.C. 7:2609.8 *et seq.*, for closure of the seepage pit referenced in paragraph 2b above, so as to be in compliance with N.J.A.C. 7:26-12.1(a).

7. Within twenty (20) calendar days upon receipt of this Administrative Order and Notice of Civil Administrative Penalty Assessment submit the enclosed **VERIFICATION OF COMPLIANCE** by certified mail, return receipt requested or by hand delivery to the address below, indicating that you have corrected the violations referenced in paragraph 4 above.

New Jersey Department of Environmental Protection
Division of Hazardous Waste Management
Bureau of Compliance and Technical Services
CN 028
Trenton, NJ 08625
Attention: Jay Basavanhally

THIS ORDER SHALL BE EFFECTIVE UPON RECEIPT.

NOTICE OF CIVIL ADMINISTRATIVE PENALTY ASSESSMENT

8. Pursuant to N.J.S.A. 13:1E-9e and based upon the above **FINDINGS**, the Department has determined that a civil administrative penalty should be assessed against Torwico in the amount of $22,500.00.

9. Payment of the penalty is due when a final order is issued by the Commissioner subsequent to a hearing, if any, or when this Notice of Civil Administrative Penalty assessment becomes a final order (see following paragraph). Payment shall be made by certified check payable to "Treasurer, State of New Jersey" and shall be submitted to:

    New Jersey Department of
      Environmental Protection
    Division of Financial Management
      Planning and General Services
    Bureau of Revenue
    CN 402
    Trenton, NJ 08625

10. If no request for a hearing is received within twenty (20) calendar days from receipt of this Notice of Civil Administrative Penalty Assessment, it shall become a final order upon the twenty-first calendar day following its receipt and the penalty shall be due and payable.

NOTICE OF RIGHT TO A HEARING

11. Pursuant to N.J.S.A. 52:14B-1 *et seq.* and N.J.S.A. 13:1E-9, Torwico is entitled to an administrative hearing. Any hearing request shall be delivered to the address below within twenty (20) calendar days from

receipt of this Administrative Order and Notice of Civil Administrative Penalty Assessment.

Assistant Director for Enforcement
Division of Hazardous Waste Management
401 East State Street
CN 028
Trenton, New Jersey 08625
Attention:
Wayne C. Howitz, Assistant Director

12. Torwico shall, in its request for a hearing, furnish NJDEP with the following:

    a. A statement of the legal authority and jurisdiction under which the hearing or action to be taken is to be held;

    b. A reference to the particular sections of the statute and rules involved;

    c. A short and plain statement of the matters of fact and law asserted; and

    d. The provisions of this Administrative Order and Notice of Civil Administrative Penalty Assessment to which Torwico objects, the reasons for such objections, and any alternative provisions proposed.

GENERAL PROVISIONS

13. This Administrative Order and Notice of Civil Administrative Penalty Assessment is binding on Torwico, its principals, directors, officers, agents, successors, assigns, any trustee in bankruptcy or other trustee, and any receiver appointed to a proceeding in law or equity.

14. Notice is given that violations of any statutes, rules or permits other than those herein cited may be cause for additional enforcement actions, either administrative or judicial. Be issuing this Administrative Order and Notice of Civil Administrative Penalty Assessment the Department does not waive its right to initiate additional enforcement actions.

15. No obligations imposed by this Administrative Order and Notice of Civil Administrative Penalty Assessment (with the exception of paragraph (8) above) are intended to constitute a debt, damage claim, penalty or other civil action which should be limited or discharged in a bankruptcy proceeding. All obligations are imposed pursuant to the police powers or the State of New Jersey, intended to protect the public health, safety, welfare, and environment.

16. Notice is given that pursuant to N.J.S.A. 13:1E-9e, the Department is authorized to assess a civil administrative penalty of not more than $25,000 for each violation and additional penalties of not more than $2,500 for each day during which the violation continues.

17. Notice is further given that pursuant to N.J.S.A. 13:1E-9f, any person who violates N.J.S.A. 13:1E-1 *et seq*. or any code, rule, or regulation promulgated thereunder shall be liable to a penalty of not more than $50,000 per day of such violation, and each day's continuance of the violation shall constitute a separate violation.

18. Notice is further given that pursuant to N.J.S.A. 13:1E-9f, any person who violates an administrative order issued pursuant to N.J.S.A. 13:1E-9c, or a court order issued pursuant to N.J.S.A. 13:1E-9d, or who fails to pay a civil administrative penalty in full after it is due

shall be subject upon order of a court to a civil penalty not to exceed $100,000 per day of such violation and each day's continuance of the violation shall constitute a separate violation.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: *[s] Wayne C. Howitz*
Wayne C. Howitz
Assistant Director
Hazardous Waste Enforcement